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SYMPOSIUM

GREAT DISSENTS IN FOURTH AMENDMENT CASES

SPONSORED BY THE
National Center for Justice and Rule of Law

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FOREWORD

GREAT DISSENTS IN FOURTH AMENDMENT CASES

Thomas K. Clancy[*]

The National Center for Justice and the Rule of Law,[1] which is a program of the University of Mississippi School of Law, focuses on issues relating to the criminal justice system, with its purpose to promote the two concepts comprising the title of the Center. In furtherance of its mission, the Center has established the *Fourth Amendment Initiative*. The purpose of the Center's initiative is to promote awareness of Fourth Amendment principles through conferences, publications, and training of professionals in the criminal justice system. The Center takes no point of view as to the direction that Fourth Amendment analysis should take but seeks to facilitate awareness of the issues and encourage discussion of search and seizure principles.

A central pillar of the *Fourth Amendment Initiative* is its annual symposium on important search and seizure topics. On February 13, 2009, the Center hosted the symposium, *"Great Dissents in Fourth Amendment Cases,"* which was the second day of an appellate judge conference on selected Fourth Amendment topics. In the audience were approximately thirty appellate judges from across the country, as well as academics,

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[1] The National Center for Justice and the Rule of Law is supported by a grant from the Bureau of Justice Assistance, Office of Justice Programs, of the United States Department of Justice. The Bureau of Justice Assistance is a component of the Office of Justice Programs, which includes the Bureau of Justice Statistics, the National Institute of Justice, the Office of Juvenile Justice and Delinquency Prevention, and the Office of Victims of Crime. Points of view or opinions in the articles stemming from this symposium are those of the author and do not represent the official position of the United States Department of Justice. For more information about the Center, please visit www.ncjrl.org.

members of the law school community, and others. It was webcast, and this symposium edition of the law journal is widely distributed.

Five dissents were examined at the symposium and in the articles written for this edition of the *Mississippi Law Journal*. The authors have chosen the seminal dissents of Justice Brandeis in *Olmstead v. United States*,[2] Justice Douglas in *Terry v. Ohio*,[3] Justice Harlan in *United States v. White*,[4] Justice Marshall in *Schneckloth v. Bustamonte*,[5] and Justice O'Connor in *Atwater v. Lago Vista*.[6] The distinguished authors are Professor Paul Butler of the George Washington University Law School, Professor Catherine Hancock[7] of Tulane University School of Law, Professor Arnold H. Loewy of Texas Tech University School of Law, Professor Wayne A. Logan of Florida State University College of Law, and Professor Carol S. Steiker of Harvard Law School.

What makes a dissent "great"? Depending on one's point of view, there are many candidates[8] for such designation, ranging

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[2] 277 U.S. 438, 471-85 (1928) (Brandeis, J., dissenting).

[3] 392 U.S. 1, 35-39 (1968) (Douglas, J., dissenting).

[4] 401 U.S. 745, 769-95 (1971) (Harlan, J., dissenting).

[5] 412 U.S. 218, 277-90 (1973) (Marshall, J., dissenting).

[6] 532 U.S. 318, 360-73 (2001) (O'Connor, J., dissenting).

[7] *See also* Catherine Hancock, *Justice Powell's Garden: The* Ciraolo *Dissent and Fourth Amendment Protection for Curtilage–Home Privacy,* 44 SAN DIEGO L. REV. 551 (2007) (addressing another important dissent in a Fourth Amendment case).

[8] *E.g.,* Hudson v. Michigan, 547 U.S. 586, 604 (2006) (Breyer, J., dissenting) (exclusion's role); Hiibel v. Sixth Judicial Dist., 542 U.S. 177, 191 (2004) (Breyer, J., dissenting) (impact of requiring person to identify himself); Minnesota v. Carter, 525 U.S. 83, 106 (1998) (Ginsburg, J., dissenting) (standing of house guests); Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 666 (1995) (O'Connor, J., dissenting) (role of individualized suspicion); County of Riverside v. McLaughlin, 500 U.S. 44, 59 (1991) (Scalia, J., dissenting) (length of time to detain prior to probable cause hearing); Illinois v. Rodriguez, 497 U.S. 177, 189 (1990) (Marshall, J., dissenting) (apparent authority to consent); California v. Greenwood, 486 U.S. 35, 45 (1988) (Brennan, J., dissenting) (normative approach to privacy); O'Connor v. Ortega, 480 U.S. 709, 732 (1987) (Blackmun, J., dissenting) (workplace privacy expectations); Illinois v. Krull, 480 U.S. 340, 361 (1987) (O'Connor, J., dissenting) (application of exclusionary rule to acts of legislature); Ybarra v. Illinois, 444 U.S. 85, 98 (1979) (Rehnquist, J., dissenting) (relationship of two clauses in context of detention of bar patron); Smith v. Maryland, 442 U.S. 735, 747 (1979) (Stewart, J., dissenting) (pen registers); Zurcher v. Stanford Daily, 436 U.S. 547, 570 (1978) (Stewart, J., dissenting) (relation of the First and Fourth Amendments); Rakas v. Illinois, 439 U.S. 128, 156 (1978) (White, J., dissenting) (automobiles and privacy); United States v. Robinson, 414 U.S. 218, 238 (1973) (Marshall, J., dissenting) (rejecting per se search inci-

from Justice Brandeis's dissent in *Olmstead*, which first proposed privacy as a centralizing principle and offered a broad view of the applicability of the Amendment, Justice Frankfurter's defense of the warrant preference model of reasonableness,[9] Justice Brennan's normative approach to privacy in such cases as *Greenwood*,[10] to Justice Black's conservative views of the structure of the Fourth Amendment in *Katz*[11] and *Berger*.[12] But is there more to a dissent that makes it important beyond espousing a particular point of view? Is it the clarity of the vision?[13] Is it the principled nature of the opinion? Is it merely the author's facility with language or the sentiment expressed?[14] Is it the fact that, in a subsequent case, that view prevailed?

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dent to arrest rule); Couch v. United States, 409 U.S. 322, 344 (1973) (Marshall, J., dissenting) (relation of the Fourth and Fifth Amendments); Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics, 403 U.S. 388, 411 (1971) (Burger, C.J., dissenting) (role of suppression); Alderman v. United States, 394 U.S. 165, 200 (1969) (Fortas, J., concurring in part and dissenting in part) (standing); Lopez v. United States, 373 U.S. 427, 446 (1963) (Brennan, J., dissenting) (secret recording by undercover agent); Goldman v. United States, 316 U.S. 129, 136 (1942) (Murphy, J., dissenting) (liberal versus literal approach to interpretation).

[9] *See* cases cited *infra* note 15.

[10] California v. Greenwood, 486 U.S. 35 (1988).

[11] Katz v. United States, 389 U.S. 347 (1967).

[12] Berger v. New York, 388 U.S. 41 (1967).

[13] An articulation of the dangers of the effects of technological advances and calls for a liberal construction were repeatedly made throughout the twentieth century, beginning with Justice Brandeis's dissent in *Olmstead v. United States*, 277 U.S. 438, 471-85 (1928) (Brandeis, J., dissenting). After *Olmstead*, many other dissenting justices expressed similar concerns. *See, e.g.*, California v. Ciraolo, 476 U.S. 207, 218, 226 (1986) (Powell, J. dissenting) (noting that advances in technology allow police to conduct surveillance without physical trespass); Dow Chem. Co. v. United States, 476 U.S. 227, 251 (1986) (Powell, J., concurring in part and dissenting in part) (suggesting that dissemination of technological advances threatens privacy rights); Osborn v. United States, 385 U.S. 323, 343 (1966) (Douglas, J., dissenting) ("[T]he privacy and dignity of our citizens is being whittled away by sometimes imperceptible steps."); On Lee v. United States, 343 U.S. 747, 759 (1952) (Frankfurter, J., dissenting) (noting that police intrusion of privacy will increase as technology progresses); Goldman v. United States, 316 U.S. 129, 137-39 (1942) (Murphy, J., dissenting) (noting that science has created additional threats to privacy).

[14] *E.g.,* Brinegar v. United States, 338 U.S. 160, 180 (1949) (Jackson, J., dissenting):

> [Fourth Amendment rights] are not mere second-class rights but belong in the catalog of indispensable freedoms. Among deprivations of rights, none is so effective in cowing a population, crushing the spirit of the individual and putting terror in every heart. Uncontrolled search and seizure is one of the first and most effective weapons in the arsenal of every arbitrary government.

Turning to a related question, is there a candidate for the label "great dissenter" in Fourth Amendment cases? That is, some one member of the Court who, over time, espoused a vision of the Amendment that was in opposition to the majority that stands out as particularly noteworthy. A few candidates come to mind; justices who dissented in a series of cases that together created a theme or coherent alternative vision for Fourth Amendment analysis. One was Justice Frankfurter, who vigorously argued for the central role of a warrant and the need for objective criteria to measure reasonableness.[15] Another is Jus-

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See also On Lee v. United States, 343 U.S. 747, 759-60 (1952) (Frankfurter, J., dissenting) (commenting on wiretapping, he observed that "[f]ew sociological generalizations are more valid than that lawlessness begets lawlessness"). Justice Brandeis's dissent, which is discussed by Professor Steiker, is perhaps the most literary of all Fourth Amendment opinions. Thus, for example, Brandeis urged that "a principle to be vital must be capable of wider application than the mischief which gave it birth." *Olmstead*, 277 U.S. at 473 (Brandeis, J., dissenting). Rejecting a literal construction to the Amendment, he argued:

> The protection guaranteed by the amendments is much broader in scope. The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men. To protect that right, every unjustifiable intrusion by the government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment.

Id. at 478. In a similar vein is *Goldman v. United States*, 316 U.S. 129, 136 (1942) (Murphy, J., dissenting). In contrast, Justice Black's dissent in *Katz v. United States*, 389 U.S. 347, 373 (1967), stands out for his defense of a literal approach to construing the Amendment:

> In interpreting the Bill of Rights, I willingly go as far as a liberal construction of the language takes me, but I simply cannot in good conscience give a meaning to words which they have never before been thought to have and which they certainly do not have in common ordinary usage. I will not distort the words of the Amendment in order to "keep the Constitution up to date" or "to bring it into harmony with the times." It was never meant that this Court have such power, which in effect would make us a continuously functioning constitutional convention.

[15] United States v. Rabinowitz, 339 U.S. 56, 69-70 (1950) (Frankfurter, J., dissenting); Harris v. United States, 331 U.S. 145, 162 (1947) (Frankfurter, J., dissenting); Davis v. United States, 328 U.S. 582, 605 (1946) (Frankfurter, J., dissenting). Frankfurter is sometimes overlooked because of his refusal to apply the Fourth Amendment directly to the activities of state and local government; instead, he sought an accommo-

tice Douglas, whose dissent in *Terry* is discussed by Professor Butler; he produced a series of dissents opposing the Warren Court's remodeling of traditional Fourth Amendment analysis[16] and outlining his concerns about the encroachments of modern life.[17] A third is Justice Brennan, who was an architect of the Warren Court's remodeling of the Amendment's structure.[18] When that era ended, he became a prolific member of the minority on the Court, criticizing the Burger and Rehnquist Courts' Fourth Amendment jurisprudence.[19] Finally, in contrast to Douglas and Brennan's liberal views, which sought expansive coverage of the Amendment, Justice Black wrote some remarkable dissents, seeking to interpret the Amendment literally and restrict its application to historical police practices.[20]

There are, of course, other important dissents and dissenters. Turning to a current member of the Court, Justice Stevens has served on the Court since December 19, 1975, and that term has encompassed the tenure of three different Chief Justices. His tenure is remarkable for the sheer number of his dissents and concurring opinions. Stevens has expressed his views in

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dation by utilizing a due process rationale. *See, e.g.,* Frank v. Maryland, 359 U.S. 360 (1959); Irvine v. California, 347 U.S. 128, 142-49 (1954) (Frankfurter, J., dissenting); Wolf v. Colorado, 338 U.S. 25 (1949).

[16] *E.g.,* United States v. Matlock, 415 U.S. 164, 178 (1974) (Douglas, J., dissenting).

[17] *E.g.*, Osborn v. United States, 385 U.S. 323, 340 (1966) (Douglas, J., dissenting).

[18] *E.g.,* Warden v. Hayden, 387 U.S. 294 (1967); Wong Sun v. United States, 371 U.S. 471 (1963).

[19] *E.g.,* Mich. Dep't of State Police v. Sitz, 496 U.S. 444, 456 (1990) (Brennan, J., dissenting) (sobriety checkpoints); Horton v. California, 496 U.S. 128, 142 (1990) (Brennan, J., dissenting) (plain view); Maryland v. Buie, 494 U.S. 325, 339 (1990) (Brennan, J., dissenting) (protective sweeps); Florida v. Riley, 488 U.S. 445, 456 (1989) (Brennan, J., dissenting) (helicopter surveillance of curtilage); California v. Greenwood, 486 U.S. 35, 45 (1988) (Brennan, J., dissenting) (expectations of privacy in garbage left for collection); United States v. Dunn, 480 U.S. 294, 305 (1987) (Brennan, J., dissenting) (open fields doctrine); Nix v. Williams, 467 U.S. 431, 458 (1984) (Brennan, J., dissenting) (inevitable discovery doctrine); United States v. Leon, 468 U.S. 897, 928 (1984) (Brennan, J., dissenting) (good faith exception to exclusion); Illinois v. Gates, 462 U.S. 213, 275 (1983) (Brennan, J., dissenting) (methodology to assess usefulness of informant tips); New York v. Belton, 453 U.S. 454, 463 (1981) (Brennan, J., dissenting) (bright line rule for vehicle searches incident to arrest); Andresen v. Maryland, 427 U.S. 463, 484 (1976) (Brennan, J., dissenting) (particularity requirement); Stone v. Powell, 428 U.S. 465, 502 (1976) (Brennan, J., dissenting) (application of exclusionary rule to habeas corpus proceedings).

[20] Katz v. United States, 389 U.S. 347, 373 (1967) (Black, J., dissenting); Berger v. New York, 388 U.S. 41, 70 (1967) (Black, J., dissenting).

virtually every major Fourth Amendment opinion since joining the Court, regardless of whether the government or the individual prevailed. Perhaps Justice Stevens's most influential dissent was in *California v. Hodari D.*[21] In that case, Justice Scalia, writing for the majority, redefined the concept of a seizure, marking the point at when a person submits to a show of authority by the police or when the police apply physical force.[22] This contrasted to the commonly held view prior to *Hodari D.* that applicability of the Fourth Amendment was not dependent upon an individual's actions and that it did not matter if the person stopped as a result of the intimidating police action.[23] Justice Stevens, dissenting in *Hodari D.*, mounted a significant defense of that view, arguing, inter alia, that "the character of the citizen's response should not govern the constitutionality of the officer's conduct."[24] A dozen state courts, on independent state grounds, have rejected the *Hodari D.* majority's approach based, in large part, on Stevens's dissent.[25] Does the mere number of his dissents put Stevens in a category of a great dissenter or does the persuasiveness of his views in *Hodari D.*, as measured by the number of courts adopting that dissent, so qualify that dissent?

Neither this symposium nor this introduction identifies all the candidates for characterization as "great" dissents. Too many points of view preclude such a task. Nonetheless, the ar-

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[21] 499 U.S. 621 (1991).

[22] *Id.* at 622-29.

[23] *See generally* THOMAS K. CLANCY, THE FOURTH AMENDMENT: ITS HISTORY AND INTERPRETATION § 5.1.4.2 (2008).

[24] 499 U.S. at 645 (Stevens, J., dissenting).

[25] *See* Joseph v. State, 145 P.3d 595, 605 (Alaska Ct. App. 2006); State v. Oquendo, 613 A.2d 1300, 1310 (Conn. 1992); Jones v. State, 745 A.2d 856, 868 (Del. 1999); State v. Quino, 840 P.2d 358, 362 (Haw. 1992); Commonwealth v. Stoute, 665 N.E.2d 93, 95-98 (Mass. 1996); Welfare of E.D.J., 502 N.W.2d 779, 781-83 (Minn. 1993); State v. Clayton, 45 P.3d 30, 34 (Mont. 2002); State v. Tucker, 642 A.2d 401, 405 (N.J. 1994); State v. Beauchesne, 868 A.2d 972, 979 (N.H. 2005); People v. Bora, 634 N.E.2d 168, 169-70 (N.Y. 1994); State v. Puffenbarger, 998 P.2d 788, 792 (Or. Ct. App. 2000); Commonwealth v. Matos, 672 A.2d 769, 776 (Pa. 1996); State v. Randolph, 74 S.W.3d 330, 336 (Tenn. 2002); State v. Young, 957 P.2d 681, 686 (Wash. 1998). The Supreme Court of Louisiana has also rejected *Hodari D.* as the sole standard to determine when a seizure occurs and has added, for the purpose of the Louisiana Constitution, the additional protection against "imminent actual stops." State v. Tucker, 626 So. 2d 707, 712 (La. 1993).

ticles by the distinguished scholars that comprise this symposium add to our knowledge of the Fourth Amendment and contribute to the debate as to its meaning. I thank the authors for contributing to the symposium and furthering our knowledge of Fourth Amendment jurisprudence.

"A LONG STEP DOWN THE TOTALITARIAN PATH": JUSTICE DOUGLAS'S GREAT DISSENT IN *TERRY V. OHIO*

Paul Butler[*]

INTRODUCTION

The police are on a routine patrol in Washington, D.C., in an all-black housing project. Imagine that at midnight they see a car carrying three white teenagers ride slowly around the block three times. The teens see a group of young black men hanging out on a street corner. They park their car near the young men and look over at them. The men ignore the kids. After five minutes, the kids start driving slowly around the block again. What should the police do?

The police are on foot patrol at a busy mall in suburban Memphis. It is lunch time on a crowded Saturday. Three Middle-Eastern-looking men have entered the food court separately, and they sit at three different tables. The men are wearing traditional Islamic clothing. The mall does not get a lot of men dressed like that. One of the men has a suitcase with him that has a decal with Arabic writing. The other two have knapsacks. Each sits at a different table, takes out a copy of the Koran, and starts reading it. What should the police do?

These hypotheticals present the essential issue in *Terry v. Ohio*.[1] Justice Douglas answers, in dissent, that the police should not do anything official. They should not bring the formal power of the state to bear—at least not yet. They can do anything that private citizens could do, like walk up to the white teenagers or the Muslim men and start chatting, but if the teens or the men want to take off, the cops have to let them go. In Douglas's view of the Constitution, the police must have

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[1] 392 U.S. 1 (1968).

probable cause before they detain any person. My thesis is that Justice Douglas's radical and "lonely"[2] dissent was right.

Perhaps, however, the Douglas dissent is not where the radical part started. Whenever the point is made that a Supreme Court decision is extreme, one has to ask whether it is the interpretation that is extreme or the Constitution itself. It is clear, for example, that the Fifth Amendment privilege against self-incrimination—a prohibition against the government requiring you to answer questions that could send you to prison—is one of those extreme rights. While no reasonable person would argue that the police should be able to torture to obtain information, many civilized societies would allow the government to put a murder suspect on the stand and have the prosecution ask, "Did you do it?" In the radical construct of freedom embodied in the Fifth Amendment, however, the state cannot force you to be an agent of your own destruction.

The text of the Fourth Amendment is less suggestive: one clause requires that government searches and seizures be reasonable, and the other requires that warrants be based on probable cause. The Warrant and Reasonableness Clauses operate in tandem.[3] There is debate among legal scholars about which one predominates.[4] The Supreme Court's reading has been that

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[2] Akhil Reed Amar, *Terry and the Future: Terry and Fourth Amendment First Principles*, 72 ST. JOHN'S L. REV. 1097, 1115 (1998).

[3] Ronald J. Bacigal, *Putting the People Back into the Fourth Amendment*, 62 GEO. WASH. L. REV. 359, 394-95 (1994) ("[t]o determine the standards for a constitutional search, the Justices have engaged in a long-standing debate over the relationship of the amendment's two conjunctive clauses: the Reasonableness Clause and the Warrant Clause.").

[4] *Compare* Shenequa L. Grey, *Revisiting the Application of the Exclusionary Rule to the Good Faith Exceptions in Light of* Hudson v. Michigan, 42 U.S.F. L. REV. 621, 628 (2008) ("whether it is by a warrant or an exception to the warrant requirement, the search or seizure is constitutional if the conduct is reasonable.") *and* Ross H. Parr, Note, *Suspicionless Drug Testing and Chandler v. Miller: Is the Supreme Court Making the Right Decisions?*, 7 WM. & MARY BILL OF RTS. J. 241, n.24 (1998) ("The Court . . . often has stated that there exists a presumption that a search or seizure is unreasonable unless the actor obtains a warrant.") *with* Scott E. Sundby, *A Return to Fourth Amendment Basics: Undoing the Mischief of Camara and Terry*, 72 MINN. L. REV. 383, 401 (1988) ("[i]n Terry, however, the Court spurned the warrant clause and traditional yardstick of probable cause, turning instead to the reasonableness clause and the balancing test appropriated from *Camara*.") *and* Scott E. Sundby, *"Everyman"'s Fourth Amendment: Privacy or Mutual Trust Between Government and Citizen?*, 94 COLUM. L. REV. 1751, 1754 (1994) ("[w]hat is not needed at this juncture is another effort to explain

"the Warrant Clause's requirement of probable cause [was] the substantive justification for a constitutional search."[5] From this perspective, "the Warrant Clause . . . domina[ted] . . . [because] although the Reasonableness Clause could excuse the absence of a warrant in certain situations, the Reasonableness Clause could not authorize a search in the absence of probable cause."[6] Another commentator notes that the "traditional" dominance of the Warrant Clause over the Reasonableness Clause stemmed from "the Court['s] . . . emphasi[s] [on] the Warrant Clause as the [Fourth] Amendment's 'cardinal principle . . . subject only to a few specifically established and well-delineated exceptions' and had used the Reasonableness Clause as a means of justifying those exceptions based on overriding necessities such as exigent circumstances."[7] The Warrant Clause predominates when the Court casts the Reasonableness Clause in a supporting role to probable cause.

That is where the radical part comes in. Under this reading of the Fourth Amendment, which was standard when *Terry* was decided, searches and seizures without probable cause are presumptively unconstitutional. The Douglas dissent was more consistent with this "law" than the majority opinion—even when it compelled the police to leave a suspect alone when it might be "reasonable" for them to detain him.

Terry v. Ohio governs more non-consensual police interactions with citizens than any other decision of the Supreme Court. Many more people are detained than are arrested. Law enforcement exploitation of the *Terry* doctrine, as seen in "zero tolerance" and "broken windows" police strategies, have occa-

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why the Court is being untrue to the Fourth Amendment of a past time when the Warrant Clause *was* king.") (emphasis added). The Supreme Court's jurisprudence provides examples which indicate that the warrant clause predominates over the reasonableness clause. *See* Parr, *infra* note 4 (citing "Payton v. New York, 445 U.S. 573 (1980) (holding that a warrant is required to enter a home for the purpose of making an arrest) [and] Mincey v. Arizona, 437 U.S. 385 (1978) (holding that there is no 'murder scene exception' to the warrant requirement.)").

[5] Bacigal, *supra* note 3, at 394.

[6] *Id.* at 395.

[7] Sundby, *supra* note 4, at 1756-57 (noting that "almost all Fourth Amendment analysis was channeled through the Warrant Clause's requirements of a warrant based upon probable cause of misconduct.") (quoting United States v. Ross, 456 U.S. 798, 825 (1982) (citation omitted).

sioned enormous distrust of the police in low-income and minority communities. *Terry* is one important reason why some people from those communities hate the cops. The first tragedy is that the case that has occasioned so much bad will was wrongly decided. As we shall see, Justice Douglas essentially predicted all of this. The second tragedy is that even now, more than forty years after *Terry* was decided, we still do not seem disposed to listen to Douglas's cry in the wilderness.

I write this article to try to change that. The article proceeds as follows: in the next section I give a brief account of William Douglas's life, emphasizing the parts of his biography that relate in some way to the issues in *Terry*. The next section provides a short account of the Great Dissenter's dissents in other cases. Then the *Terry* analysis begins, first with summary of the opinions and then an account of why the majority got it wrong and the dissent got it right. The article concludes with a reckoning of the high costs of not listening to Justice Douglas.

I. WILLIAM O. DOUGLAS: A SHORT BIOGRAPHY

William O. Douglas was born in Maine, Minnesota, on October 16, 1898.[8] He once told associates that "[a]ll I remember of my childhood is pain and poverty."[9] After high school, Douglas attended Whitman College in Walla Walla, Washington, but the two-hundred dollar scholarship did not pay for books and room and board; he worked his way through college working as a janitor, a waiter, a fruit picker, and even as a firefighter.[10] Douglas also joined Whitman's debate team, where, foreshadowing his many memorable Supreme Court dissents, he made a name for himself by shredding his opponent's arguments.[11] In the much-attended debate against University of Washington in 1919, Douglas won for the underdog Whitman team with an innovative rebuttal; instead of addressing every one of the myriad arguments addressed by Washington's team, Douglas ignored

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[8] Bruce Allen Murphy, Wild Bill: The Legend and Life of William O. Douglas 8-11 (2003).

[9] *Id.* at 17.

[10] *Id.* at 30-31.

[11] *Id.* at 35.

the issues that he believed to be irrelevant and targeted the single biggest weakness in Washington's argument.[12] Douglas then sat down with almost all of his speaking time remaining; the crowd was stunned, but the judges were impressed, and they rewarded Douglas with a Whitman victory.[13]

At Columbia Law School, Douglas found himself drawn to the teaching and legal theory of Professor Underhill Moore, an eccentric professor who used social-science research techniques to discover the real-world implications of legal doctrine.[14] Professor Moore became Douglas's mentor, hiring Douglas to revise his casebook for Bills and Notes, even though Douglas had not yet taken the class.[15] Douglas was chosen for the Columbia Law Review,[16] and, after graduating, his hard work was further rewarded; the school faculty offered Douglas an exclusive lecturer-in-law position, which he promptly accepted.[17]

Douglas was an energetic and innovative professor. One student described him as "a cowboy on a horse . . . . He was all over the room, cracking out his precedents and questions as fast as we could write, driving, driving, driving, driving us as he drove himself."[18] He was particularly energized by Columbia's efforts, driven by Professor Herman Oliphant, in the "legal realist" movement. Oliphant hoped to alter the school's curriculum into a laboratory for the new jurisprudence.[19] However, when university president Nicholas Murray Butler elevated Professor Young B. Smith, a member of the old guard, rather than legal realist Professor Oliphant to become the new dean of the law school, Douglas resigned in protest and accepted an offer to teach at Yale Law School.[20] There Douglas fully embraced legal realism, including by reorganizing the corporate-law offerings along legal realist lines, creating an entire curriculum organized

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[12] *Id.*
[13] *Id.*
[14] *Id.* at 48.
[15] *Id.* at 48.
[16] *Id.* at 49.
[17] *Id.* at 52.
[18] *Id.* at 72.
[19] *Id.* at 73.
[20] *Id.* at 74-80.

on the "life cycle" of corporations, and teaming up with Harvard Business School professor George Bates to launch a joint degree program between the schools.[21] Douglas reinvented the study of corporate law, wrote five major corporate law casebooks in five years and conducted empirical social-science research into the effect of bankruptcy law. Meanwhile, the Great Depression and local financial scandals brought issues of corporate law issues into a harsh limelight.[22] Douglas's research received national attention, and he was promoted to Sterling Professor of Law at Yale.[23]

William Douglas's ambition, however, extended outside of the academy. He became an expert on the Securities Act of 1933, which requires registration of securities sales to inform investors of the nature and potential risks of investments, and he published an article entitled "Protective Committees in Railroad Reorganization."[24] Due to this experience, Douglas was appointed to direct a study, headed by the Securities and Exchange Commission and mandated under the Securities Act of 1934 Act, which would investigate corruption in bankruptcy proceedings.[25] Hiring his former Yale student Abe Fortas to be his right-hand man, Douglas took an aggressive stance; he summed up his philosophy towards corrupt corporations in three words: "Piss 'on 'Em."[26]

Corruption was everywhere. Douglas uncovered so many illegal practices that *Barron's, the National Financial Weekly* described his effort as "obviously a complete victory for the commission."[27] His work caught the attention of Robert Kintner, the *New York Herald Tribune*'s financial columnist, who found Douglas's analysis so cogent that Douglas was soon featured in at least one article each week on the first page of the financial section.[28] After Douglas led several other successful investiga-

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[21] *Id.* at 87-88.
[22] *Id.* at 89-91.
[23] *Id.* at 104.
[24] *Id.* at 106-07.
[25] *Id.* at 107.
[26] *Id.* at 108-09.
[27] *Id.* at 110.
[28] *Id.*

tions, President Franklin Delano Roosevelt called Douglas to appoint him SEC Commissioner.[29] In this position, Douglas delivered "two fisted addresses" that railed against the excesses and corruption in the financial community.[30] When Charles R. Gay, president of the New York Stock Exchange, accused the SEC of over regulating the market, FDR responded by appointing Douglas, the SEC Commissioner whom Wall Street feared most, to be SEC Chairman.[31]

Soon after, President Roosevelt selected Douglas to replace retiring Justice Louis Brandeis on the United States Supreme Court.[32] He was confirmed by a vote of sixty-two to four.[33]

On the Court, Justice Douglas was unique; he wrote short opinions in "one burst of creative energy" and developed the reputation of being "the quickest opinion writer since Holmes."[34] Recent scholarship suggests that his early votes and decisions, which reflected a pro-government conservatism,[35] may have been influenced by his continuing political aspirations; thanks to the help of various political operatives, Douglas was almost chosen to displace Henry Wallace as President Roosevelt's vice president in 1944,[36] to replace Presidential Harry Truman as the Democrat's presidential nominee in 1948,[37] and to run alongside potential Presidential candidate Lyndon B. Johnson in 1960.[38] In time, perhaps due to a changing political landscape or internal disputes with conservative Justices Felix Frankfurter and Robert H. Jackson, Douglas began to shift away from deference to government authority and towards expansion of civil rights.[39] When liberal Justices Frank Murphy and Wiley Rutledge died within two months of each other, Justice Douglas and Justice Hugo Black, eventually joined by Chief Justice Earl Warren and

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[29] *Id.* at 110-17.
[30] *Id.* at 124-30.
[31] *Id.* at 131-33.
[32] *Id.* at 174.
[33] *Id.* at 175.
[34] *Id.* at 182.
[35] *Id.* at 246-47.
[36] *Id.* at 212-32.
[37] *Id.* at 251-65.
[38] *Id.* at 346-51.
[39] *Id.* at 267-68.

Associate Justice William Brennan, carried the liberal mantle, leading the Court towards the largest expansion of individual rights ever seen in United States jurisprudence.[40] Justice Douglas resigned in 1975, after having served on the Supreme Court for thirty-six years, longer than any other Supreme Court Justice in history.[41] Douglas wrote 1,164 full opinions, including 486 dissents.[42]

II. THE GREAT DISSENTER

Justice Douglas was an influential Supreme Court dissenter.[43] He has been characterized as a "'maverick'"[44] and as one of

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[40] *Id.* at 302-03.

[41] *Id.* at 495.

[42] *Id.* at 495.

[43] At least thirty-eight articles refer to one of Justice Douglas's dissents using terms such as strong, powerful, forceful, notable or otherwise note the significance of the dissent. Using rough categories, Justice Douglas's dissents spanned Fourth Amendment jurisprudence, equal protection jurisprudence, privacy jurisprudence, takings jurisprudence, environmental jurisprudence and taxation. One example from each of these five categories is included below.

Yale Kamisar, *Symposium: Miranda after Dickerson: The Future of Confession Law: Foreword: From Miranda to Section 3501 to Dickerson to . . .*, 99 MICH. L. REV. 879, 887 (2001) (noting that "[d]espite Justice Douglas's forceful dissent, the mischievous language in [*Michigan v.*] *Tucker*[, 417 U.S. 433, 446 (1974)] did not go away").

Mark John Kappelhoff, Note, Bowers v. Hardwick*: Is there a Right to Privacy?*, 37 AM. U. L. REV. 487, 493-94 (1988) (asserting that "[i]n 1961, Justice Douglas's dissent in *Poe v. Ullman*, 367 U.S. 497, 515-16 (1961) (Douglas, J., dissenting) provided the jurisprudential foundation for expanding the meaning of 'liberty'").

Scott Alexander Nelson, *The Supreme Court Takes a Weapon from the Drug War Arsenal: New Defenses to Civil Drug Forfeiture*, 26 ST. MARY'S L.J. 157, 166 (1994) (referring to Justice Douglas's dissent in Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 693 (1974) as notable because it "recognized that the notion of guilty property is a fiction and depicted the case as 'one of extreme hardship.'"). Daryl Fisher-Ogden & Shelley Ross Saxer, *World Religions and Clean Water Laws*, 17 DUKE ENVTL. L. & POL'Y F. 63, 77-79 (2006) (discussing how Justice Douglas, in his famous Sierra Club v. Morton, 405 U.S. 727, 742 (1972) dissent, argued that environmental objects should be granted standing "to sue for their own preservation.")

James W. Colliton, *Standards, Rules and the Decline of the Courts in the Law of Taxation*, 99 DICK. L. REV. 265, 319 n.277 (1995) (referring to Justice Douglas's dissent in Comm'r v. Idaho Power Co., 418 U.S. 1, 19 (1974) as notable).

[44] Jim Chen, *Defunis, Defunct*, 16 CONST. COMMENT. 91, 96-7 (1999) ("Like President Clinton after him, [in *DeFunis v. Odegaard*, 416 U.S. 312, 337 (1974) (Douglas, J., dissenting)] Justice Douglas ultimately decided to try mending affirmative action without ending it.") (quoting Bernard Schwartz, BEHIND BAKKE: AFFIRMATIVE ACTION AND THE SUPREME COURT 33, 33 (New York U. Press, 1988)).

the "Warren Court's leading liberals. . . ."[45] In *DeFunis v. Odegaard*,[46] Justice Douglas was the only member of the Court to "address[] the merits of DeFunis'[s] constitutional claim."[47] Douglas demonstrated his nuanced understanding of racial justice in his statement that "[t]he melting pot is not designed to homogenize people, making them uniform in consistency."[48] He asserted that courts should consider whether to replace the LSAT with another test to ensure "that racial factors do not militate *against an applicant or on his behalf*."[49] Justice Douglas's *DeFunis* dissent "foreshadowed the 'plus factor' approach that would prevail in *Bakke*[,] . . . [and] [h]is proposals to abolish the LSAT and to administer direct tests of an applicant's propensity to work in underserved communities resonate[s] with many contemporary proposals for reform."[50] Similarly, Justice Douglas's dissent in *Wright v. Rockefeller*[51] "anticipated and . . . rejected the 'benign intent' argument invoked in later affirmative action cases."[52] "[T]hree decades later [Justice Douglas's reasoning] in *Wright* [influenced a chain of] . . . voting-rights decisions beginning with *Shaw v. Reno*."[53]

Another example of Justice Douglas's ability to see into the future is found in his dissent in *Sierra Club v. Morton*.[54] In 1972, it seemed radical for Justice Douglas to argue that trees should be given standing in court.[55] Today, lawsuits challenging harms committed against the environment are filed regularly.[56]

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[45] *Id.* at 98.

[46] 416 U.S. 312 (1974) (Douglas, J., dissenting).

[47] Foy Meyer III, *The Rise and Fall of Affirmative Action*, 8 TEX. REV. L. & POL. 437, 511 (2004) ("Perhaps the most important aspect of *DeFunis* was Justice Douglas'[s] dissenting opinion, the only one addressing the merits of Defunis'[s] constitutional claim.").

[48] 416 U.S. at 334 (Douglas, J., dissenting).

[49] *Id.* at 336; *see* Chen, *supra* note 44, at 96-97.

[50] Chen, *supra* note 44, at 97.

[51] 376 U.S. 52 (1964).

[52] Chen, *supra* note 44, at 98.

[53] *Id.* (referring to *Shaw v. Reno*, 509 U.S. 630 (1993)).

[54] 405 U.S. 727 (1972) (Douglas, J., dissenting).

[55] *Id.*

[56] Kimberly E. O'Leary, *Using "Difference and Analysis" to Teach Problem-Solving*, 4 CLINICAL L. REV. 65, 68-9 (1997) ("When the late Supreme Court Justice William O. Douglas posed his now-famous question 'Should trees have standing?,' [in *Sierra Club v. Morton*] he was widely believed to be far outside the mainstream of American law.

The landmark Supreme Court case *Griswold v. Connecticut*[57] is a cornerstone of privacy jurisprudence. The source of *Griswold*'s reasoning? Justice Douglas's *Poe v. Ullman*[58] dissent.[59] Justice Douglas's *Poe* dissent "[laid] the jurisprudential foundation for expanding the meaning of 'liberty.'"[60] In *Adler v. Board of Education*,[61] Justice Douglas was the first Supreme Court Justice to "conceive a theory of academic freedom" and, more importantly, the first to "identif[y] [it] as a subset of the First Amendment."[62] Again, Justice Douglas's theory was later adopted by the Supreme Court.[63] Justice Douglas's dissent in *Packard Motor Co. v. National Labor Relations Board*[64] became the "intellectual underpinning for the Court's adherence to the management-labor dichotomy."[65] State legislatures were influenced by Justice Douglas's dissent in *Broadrick v. Oklahoma*[66] to "affirm[] the rights of employees to participate in politics while not on the job."[67] One scholar asserts that Justice Douglas's dissent in

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However, citizens now routinely bring lawsuits that challenge harms to the environment.").

[57] 381 U.S. 479 (1965).

[58] 367 U.S. 497 (1961).

[59] Maggie Ilene Kaminer, *How Broad is the Fundamental Right to Privacy and Personal Autonomy? – On What Grounds Should the Ban on the Sale of Sexually Stimulating Devices be Considered Unconstitutional?*, 9 AM. U.J. GENDER SOC. POL'Y & L. 395, 402 (2001) ("Five years after the Court refused to address a Connecticut statute criminalizing the use of contraceptives by married couples, the Court adopted the reasoning of Justice Douglas'[s] dissent in *Poe v. Ullman* in *Griswold v. Connecticut* [, 381 U.S. 479, 485-86 (1965)] and held the same Connecticut statute unconstitutional.").

[60] Kappelhoff, *supra* note 43, at 493-94 ("In 1961, Justice Douglas' dissent in *Poe v. Ullman* provided the jurisprudential foundation for expanding the meaning of 'liberty.'").

[61] 342 U.S. 485 (1952) (Douglas, J., dissenting).

[62] Rachel E. Fugate, *Choppy Waters are Forecast for Academic Free Speech*, 26 FLA. ST. U.L. REV. 187, 192 (1998) ("What is most notable about Justice Douglas'[s] dissent [in *Adler*] is not that academic freedom is mentioned for the first time but, rather, that it is identified as a subset of the First Amendment.").

[63] *Id.* at 192.

[64] 330 U.S. 485 (1947) (Douglas, J., dissenting).

[65] Jonathon B. Goldin, Comment, *Labor-Management Cooperation: Bath Iron Works's Bold New Approach*, 47 ME. L. REV. 415, 453-54 n.158 (1995) ("It was Justice Douglas's dissent in the Court's 1947 decision in *Packard Motor Car Co. v. NRLB*, 330 U.S. 485, n.158 (1947), that became the intellectual underpinning for the Court's adherence to the management-labor dichotomy.").

[66] 413 U.S. 601 (1973) (Douglas, J., dissenting).

[67] *Developments in the Law – Public Employment [Part 1 of 2]*, 97 HARV. L. REV. 1611, 1659 (1984) ("More significantly, in light of the relaxation of federal restrictions on

Cardona v. Power[68] is one of "[t]he two most important Supreme Court opinions relating to the question of non-English speaking voters."[69] As demonstrated by the examples presented above, Justice Douglas's positions were not those of an irresponsible maverick. Rather, his dissenting opinions provided foundations for future legal developments.

Justice Douglas also had a capacity for empathetic decision-making. For example, one scholar notes that Justice Douglas's "central concern" in *Wisconsin v. Yoder*[70] "was not the dispute between the parents and the state . . . but [rather] the possibility of a dispute between the children and the state."[71] In *Calero-Toledo v. Pearson Yacht Leasing Co.*, [72] Justice Douglas noted that the case was "one of extreme hardship."[73] As reflected in *Sierra Club v. Morton*,[74] Justice Douglas's empathy extended even to nature.[75]

III. 1967: STREET LAW

In 1967, the year *Terry* was decided, the streets seemed buck wild. Not only was crime increasing, there were also urban riots and campus uprisings. The police responded aggressively, by detaining people, not because they had probable cause to arrest, but rather because their suspicion was aroused, and they wanted to investigate further. In the hypothetical at the

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nonfederal employees, many state legislatures have taken a cue from Justice Douglas's dissent in *Broadrick* and affirmed the rights of public employees to participate in politics while not on the job.").

[68] 384 U.S. 672 (1966) (Douglas, J., dissenting).

[69] Sandra Guerra, *Voting Rights and the Constitution: The Disenfranchisement of Non-English Speaking Citizens*, 97 YALE L.J. 1419, 1421 (1988) ("The two most important Supreme Court opinions relating to the question of non-English speaking voters are the majority opinion in *Katzenbach v. Morgan* [384 U.S. 641 (1966)] and Justice Douglas' [s] dissent in *Cardona v. Power* ").

[70] 406 U.S. 205 (1972) (Douglas, J., dissenting).

[71] Janet L. Dolgin, *The Fate of Childhood: Legal Models of Children and the Parent-Child Relationship*, 61 ALB. L. REV. 345, 387 (1997) ("Even today, almost three decades after the Court decided *Yoder,* Justice Douglas's understanding of children and of the parent-child relationship in that case contrasts markedly with almost all Supreme Court jurisprudence involving conflicts between parents and the state.")

[72] 416 U.S. 663, 693 (1974) (Douglas, J., dissenting).

[73] Nelson, *supra* note 43, at 166.

[74] 405 U.S. 727 (1971) (Douglas, J., dissenting).

[75] *Id.* at 742.

beginning of this article, for example, the police might have put on their siren and flashing light, stopped the car containing the teens, and asked what they were doing in that part of town at that time of night. When the police stopped someone they thought might have a weapon, they frisked.

If one were to ask the cops about their legal authority for the stop and frisk, they would most likely offer one of two answers: 1) It was what they were taught on the street or in the police academy or 2) that the Fourth Amendment applied only to arrests and full searches, and not to investigative detentions and pat downs. A New York police officer might say that he had "reasonable suspicion." State courts in New York were one of the few court systems that prior to 1967 had considered the constitutionality of stop and frisks, and that is the standard that they developed.[76]

IV. STOP AND FRISK

In *Terry v. Ohio*, the Supreme Court blessed the police practice of investigative detentions without probable cause. It ruled that the police can briefly detain someone when they have "reasonable suspicion" that a crime may be occurring, or is about to occur.[77] Cops can "pat down" the person whom they have stopped if they have reasonable suspicion that the suspect is armed.[78] The "sole justification of the search . . . is the protection of the police officer and others nearby, and it must therefore be confined in scope" to discover weapons.[79]

In the *Terry* case, an experienced detective's attention was drawn to two African-American men who were standing on a street corner in downtown Cleveland.[80] The detective did not know why he had started watching them; he said he was "attracted" because "they didn't look right to me at the time."[81] The detective observed the men walk up and down the street looking

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[76] *Terry*, 392 U.S. at 19 n.15.
[77] 392 U.S. at 27.
[78] *Id.* at 8.
[79] *Id.* at 29.
[80] *Id.* at 5.
[81] *Id.*

in the same store window several times.[82] He suspected they were "casing" a store with the intention of robbing it.[83] Next, however, the two men walked away from the store and were joined by a white man.[84] At that point, the detective approached, asked the men to give their names, and when Mr. Terry "mumbled something" in response, he grabbed Mr. Terry and pushed him against a wall.[85] The detective then patted down Mr. Terry and felt something that might have been a gun in his coat pocket.[86] He ordered all three men inside a store, where he frisked them. Mr. Terry and one of the other men were carrying guns.[87]

The prosecutors argued that the Fourth Amendment, which regulates government searches and seizures, did not apply because Mr. Terry had not been searched and seized within the meaning of the Amendment. The Supreme Court

> emphatically reject[ed] this notion. . . . It must be recognized that whenever a police officer accosts an individual and restrains his freedom to walk away, he has "seized" that person. And it is nothing less than sheer torture of the English language to suggest that a careful exploration of the outer surfaces of a person's clothing all over his or her body in an attempt to find weapons is not a "search." Moreover, it is simply fantastic to urge that such a procedure performed in public by a policeman while the citizen stands helpless, perhaps facing a wall with his hands raised, is a "petty indignity." It is a serious intrusion upon the sanctity of the person, which may in-

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[82] *Id.* at 6.

[83] *Id.*

[84] Upon first blush, it's strange that the detective approached Mr. Terry while he was walking away from the store that the detective suspected he was casing but the fact that the two African-American men were joined by a white man probably would have further aroused the officer's suspicion. During this time in Cleveland (although not just Cleveland), police lore was that the presence of black and white men together was a strong indicator of potential criminal activity. John Barrett, Terry v. Ohio: *The Fourth Amendment Reasonableness of Police Stops and Frisks Based on Less Than Probable Cause*, Criminal Procedure Stories 295 (Carol S. Steiker ed., Foundation Press 2006).

[85] *Terry*, 392 U.S. at 7.

[86] *Id.*

[87] *Id.* at 6-7.

> flict great indignity and arouse strong resentment, and it is not to be undertaken lightly.[88]

Since the Court found that Mr. Terry had been seized and searched, Fourth Amendment precedent required that police have "probable cause."[89] The Court, however, declined to apply this (relatively) high standard, stating that "we deal here with an entire rubric of police conduct–necessarily swift action predicated upon the on-the-spot observations of the officer on the beat–which . . . as a practical matter could not be . . . subjected to the warrant procedure."[90] It held that the Fourth Amendment simply required the police conduct to be reasonable, which could be determined by balancing the government interest (investigating crime and officer safety) against the individual interest (privacy).[91] The Court specifically noted that it was not abandoning the jurisprudence that a search is presumptively unconstitutional if there is no probable cause, but simply creating a limited exception.[92]

Justice Douglas was the lone dissenter.[93] He observed that the probable cause standard was deeply rooted in the country's history and the Court's precedent.[94] Justice Douglas did not think the reasonableness balancing test was constitutionally sound because he thought the Fourth Amendment itself already balanced the relevant interests.[95] Douglas observed that there was no probable cause to arrest Mr. Terry before the search, because his crime, carrying a concealed weapon, had been dis-

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[88] *Id.* at 16-17.
[89] *Id.* at 25-26.
[90] *Id.* at 20.
[91] *Id.* at 21.
[92] *Id.* at 27.
[93] *Id.* at 35-39 (Douglas, J. dissenting). Justice Thurgood Marshall had only recently joined the court. There is some evidence that he later regretted his vote with the majority. *See* John Q. Barrett, "*Deciding the Stop and Frisk Cases: Look Inside the Supreme Court's Conference*," 72 ST. JOHN'S L. REV. 749, 843 (1998) ("Justice Marshall, who as a newcomer to the Court was relatively uninvolved in the Court's internal arguments over the stop and frisk cases, all but stated in later cases that he had voted wrong in Terry.").
[94] *Terry,* 392 U.S. at 37 (Douglas, J. dissenting).
[95] *Id.* at 38-39.

covered during the search.[96] Thus, if before Mr. Terry had been searched, the police had gone to a magistrate and sought a warrant to search him, a judge would have had to deny the warrant.[97] Douglas wrote:

> To give the police greater power than a magistrate is to take a long step down the totalitarian path. Perhaps such a step is desirable to cope with modern forms of lawlessness. But if it is taken, it should be the deliberate choice of the people through a constitutional amendment. There have been powerful hydraulic pressures throughout our history that bear heavily on the Court to water down constitutional guarantees and give the police the upper hand. That hydraulic pressure has probably never been greater than it is today. Yet if the individual is no longer to be sovereign, if the police can pick him up whenever they do not like the cut of his jib, if they can "seize" and "search" him in their discretion, we enter a new regime. The decision to enter it should be made only after a full debate by the people of this country.[98]

V. THE *TERRY* COMPROMISE

In *Terry*, the Supreme Court did what it sometimes does when it is presented with an interpretation of the Constitution that seems both correct and politically untenable: it split the baby. The best known example in a criminal procedure case is the decision in *Miranda v. Arizona*.[99] The American Civil Liberties Union had argued that whenever a suspect was subject to police questioning, the Fifth Amendment's privilege against self-incrimination required that a lawyer be present. The Court's compromise, embodied in the "*Miranda* warnings," was that the suspect did have a right to a lawyer, but, after she was advised of the right, she could waive it immediately and proceed to police questioning absent a lawyer.[100] In *Terry*, the Court held, against the wishes of the law enforcement community,

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[96] *Id.* at 35-36.
[97] *Id.*
[98] *Id.* at 38-39.
[99] 384 U.S. 436 (1966).
[100] *Id.* at 478-79.

that stops and frisks were searches and seizures, and thus were governed by the Fourth Amendment. Then, however, against Mr. Terry's assertion, it ruled for the first time that stops and frisks could be subject to a lower standard than probable cause; in this one specific (but far from rare) occurrence, the new standard was "reasonableness."

Then and now, the *Terry* decision has been widely heralded. The *New York Times*, in an editorial the day after the case was decided, said "[T]he Supreme Court's 8-1 decision . . . will help persuade policemen that the Court does not lie awake nights dreaming up ways to increase the hazards of their jobs."[101] More recently, Professor Stephen Saltzburg described *Terry* as "a practically perfect doctrine."[102]

So what's the problem? Justice Douglas's dissent essentially identified two major problems with the Court's analysis. First, it was inconsistent with all of the Court's previous interpretations of the Fourth Amendment. Second, it gave too much power to the police.

VI. STARE DECISIS

The majority opinion offered no settled jurisprudential reason for departing from the "warrant clause predominates" rule that had governed Fourth Amendment analysis. Rather, the Court's analysis was premised on its perception on the realities of police work in the mean months of 1967. The majority opinion claimed that, "as a practical matter," the probable cause clause could not govern stop and frisk law because the police had to act quickly to tame the streets.[103] If they were required to take the time to get a warrant, or even to wait for probable cause, bedlam might ensue.

Perhaps, Justice Douglas replied, but there is still the Constitution. He described the Court's legal rationale in support of searches and seizures without probable cause as "a mystery."[104]

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[101] *"Unreasonable" Still Stands*, N.Y. Times, June 12, 1968, at 46.

[102] Stephen A. Saltzburg, Terry v. Ohio*: A Practically Perfect Doctrine*, 72 St. John's L. Rev. 911 (1998).

[103] *Terry*, 392 U.S. at 20.

[104] *Id.* at 35 (Douglas, J., dissenting).

He noted that the Court had "always used the language of 'probable cause'" to access the constitutionality of warrantless seizures of persons.[105] Douglas quoted Supreme Court precedent that described the probable cause requirement as having "roots that are deep in our history."[106] In *United States v. Henry*, the Court stated, "as early American decisions both before and immediately after [the Fourth Amendment's adoption] show, common rumor or report, suspicion or even 'strong reason to suspect' was not adequate to support a warrant for arrest. And that principle has survived to this day."[107]

That the principle did not survive past the summer day in 1967 that *Terry* was decided troubled Douglas not only for its practical consequences, but also as a matter of jurisprudence. Douglas noted that there might be a perceived need to give the police more power to "cope with modern forms of lawlessness."[108] The process of changing the requirements of the Fourth Amendment, however, was not up to the Supreme Court; rather "it should be the deliberate choice of the people through a constitutional amendment."[109]

Sometimes liberal Supreme Court justices are described as being ends-justified or consequentialist in their analysis. The concern is that judicial activists (a term applied more frequently to progressive justices rather than conservative ones) ignore settled precedence, or even the Constitution, in order to achieve a particular result. The more compelling case, in *Terry*, is that the eight other justices did not accord the Constitution the respect that it was due. It is true that the Fourth Amendment makes it more, rather than less, difficult for the police to investigate crimes, and that if the Court had decided *Terry* the way that Justice Douglas wanted, there might be some diminution in the ability of the police to prevent crime. It is also true, however, that if the majority of the Court did not like that allocation between citizen's rights and police power, they had no legal au-

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[105] *Id.* at 36 n.3.

[106] *Id.* at 37 (Douglas, J., dissenting) (quoting Henry v. United States, 361 U.S. 98, 100).

[107] *Id.* at 37-38 (quoting *Henry*, 361 U.S. at 101).

[108] *Id.* at 38.

[109] *Id.*

thority to change it. The balance, as Justice Douglas pointed out, already had been struck in the Constitution.

VII. POLICE POWER

Mr. Terry was arrested for carrying a concealed weapon. The problem is that the police did not find out that he was carrying a concealed weapon until they had seized him, without probable cause, and searched him, without probable cause. The most salient fact for Douglas is that if, prior to the arrest, the police had gone to a magistrate and sought a warrant to search Mr. Terry for a concealed weapon, they wouldn't have gotten it because here was no probable cause. Now, however, as a result of the Court's decision, the police could search for a weapon without a warrant and without probable cause. To Douglas this meant that the *Terry* decision gave the police more power than a magistrate.[110]

Professor Ahkil Amar has characterized the majority's analysis of this issue as weak and noted that it never responded to this point of the Douglas dissent.[111] Perhaps the Court did not respond because Douglas was correct. The police, whom the Court described in another Fourth Amendment case as "engaged in the often competitive enterprise of ferreting out crime"[112] are allowed to use their own judgment about when they can detain a person who is, in the eyes of the law, innocent, and the standard that they use—reasonable suspicion—is lower than the magistrate's requirement of probable cause. It was not farfetched to imagine that the police would use *Terry* as a pretext to search in situations in which a magistrate—one might even say the Fourth Amendment—would not have allowed. And of course the police have enthusiastically engaged in such pretextual searches (and seizures), a practice the Supreme Court blessed in a later case.[113]

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[110] *Id.* at 36.
[111] Amar, *supra* note 2, at 1115.
[112] Johnson v. United States, 333 U.S. 10, 14 (1948).
[113] Whren v. United States, 517 U.S. 806 (1996).

Justice Douglas noted "powerful hydraulic pressures . . . [that] water down constitutional guarantees and give the police the upper hand."[114] Again acknowledging the mean streets of the late 1960's, he added that the pressure had "never been greater than it is today." [115] His concern, however, was that if the police could search and seize at their discretion, we enter a "new regime."[116] Now, more than forty years after Douglas made that prediction, we are fully there.

VIII. WHY THE *TERRY* DISSENT IS GREAT

Professor Mark Tushnet has described three characteristics that "great dissents" share: 1) they accurately predict the future, 2) they use rich rhetoric because they want their analysis to be remembered by future generations (as opposed to swaying contemporary courts), and 3) they "set out an account of democracy . . . that cannot fail to move the reader."[117] By all three of these measures, the Douglas dissent is great.

A. The Douglas Dissent Predicts the Future

Consider the inglorious progeny of *Terry*. It includes the blessing, by some federal courts, of racial profiling. [118] It includes *Illinois v. Wardlow*, in which the Supreme Court held that *Terry* allows the police to detain people who only arouse suspicion because they happen to be in a high-crime area and they want to evade the police. [119] It includes this list of factors that various federal courts have found constitute "reasonable suspicion" of drug couriers at airports:

Arrived late at night

Arrived early in the morning

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[114] *Terry*, 392 U.S. at 39 (Douglas, J., dissenting).

[115] *Id.*

[116] *Id.*

[117] I Dissent: Great Opposing Opinions in Landmark Supreme Court Cases 98-99 (Mark Tushnet ed., 2008).

[118] United States v. Weaver, 966 F.2d 391 (8th Cir. 1992). *See generally* David A. Harris, Profiles in Injustice: Why Racial Profiling Cannot Work (2002).

[119] 528 U.S. 119 (2000).

One of first to deplane

One of last to deplane

Deplaned in the middle

Used a one-way ticket

Used a round-trip ticket

Carried brand-new luggage

Carried a small gym bag

Traveled alone

Traveled with a companion

Acted too nervous

Acted too calm

Wore expensive clothing and gold jewelry

Dressed in black corduroys, white pullover shirt, loafers without socks

Dressed in dark slacks, work shirt, and hat

Dressed in brown leather aviator jacket, gold chain, hair down to shoulders

Dressed in loose-fitting sweatshirt and denim jacket

Walked rapidly through airport

Walked aimlessly through airport

Flew in to Washington National Airport on the LaGuardia Shuttle

Had a white handkerchief in his hand.[120]

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[120] United States v. Hooper, 935 F.2d 484, 499-500 (2d Cir. 1991) (Pratt, J., dissenting) (citing United States v. Sokolow, 490 U.S. 1, 13-14 (1989) (Marshall, J., dissenting) (internal citations omitted)).

As troubling, the Supreme Court has extended its "reasonableness" analysis outside of the context of stop and frisk – despite its avowal in *Terry* that it was carving out a limited exception.[121] Since *Terry*, reasonableness analysis has prevailed in cases involving drug testing,[122] border searches,[123] police checkpoints,[124] and inventory searches,[125] among others. Indeed some scholars have interpreted the Court's opinion in *United States v. Knights*, in which it declared "[t]he touchstone of the Fourth Amendment is reasonableness,"[126] as its effective abandonment of the "warrant clause predominates" jurisprudence.[127]

This is the "new regime" of which Douglas warned. It is not "totalitarianism" but it is a "long step" down that path. The *Terry* doctrine is a major contributor to the widespread antipathy toward the police that many people in minority and low-income communities demonstrate, because they know that, in the words of the Douglas dissent, "the police can pick [a person] up whenever they do not like the cut of his jib."[128]

B. Memorable Rhetoric

In his dissent in *Terry*, Justice Douglas dropped the "t" bomb. He wrote, "To give the police greater power than a magistrate is to take a long step down the totalitarian path."[129] To use the word "totalitarian," in the middle of the cold war, to describe a U.S. Supreme Court ruling was more than a rhetorical flourish; it was a prediction of a future in which the United

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[121] *Terry* ,392 U.S. at 27.

[122] Bd. of Educ. v. Earls, 536 U.S. 822 (2002).

[123] United States v. Ramsey, 431 U.S. 606 (1977).

[124] Mich. Dep't of State Police v. Sitz, 496 U.S. 444 (1990).

[125] Arizona v. Gant, 129 S. Ct. 1710 (2009) (the only case listed here in which Court used reasonableness analysis and found search unreasonable).

[126] 534 U.S. 112, 118 (2001).

[127] *See* Kimberly S. Keller, *Privacy Lost: Comparing the Attenuation of Texas's Article I, Section 9 and The Fourth Amendment,* 34 St. Mary's L. J. 429, 432 (2003) ("In *United States v. Knights*, the Court emphasized its trend to shift focus from the 'warrant requirement' to the requirement of 'reasonableness' . . . ."); Jonathan T. Skrmetti, *The Keys to the Castle: A New Standard for Warrantless Home Searches in* United States v. Knights, 25 Harv. J.L. & Pub. Pol'y 1201, 1208-1212 (2002).

[128] *Terry*, 392 U.S. at 39 (Douglas, J., dissenting).

[129] *Id.* at 38.

States would use tactics more like those of its adversaries. If, as in Tushnet's account of great dissents, the writing is for future generations rather than present courts, the t-word rings, forty years later, loudly and clearly. The only thing that Justice Douglas appeared not to have anticipated, when he stated the "hydraulic" pressure to "water down constitutional guarantees"[130] during unsafe times is September 11, 2001.

The passage that invokes the specter of totalitarianism is not cited much in opinions by lower courts—one understands that judges might be reluctant to characterize their fellow jurists' decisions with such a strong word. In the academic literature, however—especially criminal procedure casebooks and law review articles—the line about the "long step down the totalitarian path" appears in virtually every account of *Terry*. This is not to say that the words are always cited approvingly; as mentioned above, the *Terry* majority opinion has been heralded by many scholars as an appropriate compromise. In these discussions, however, the t-word is ever present, like an echo.

C. Douglas's Account of Democracy

Justice Douglas's dissent is profoundly concerned with democracy. He believes that the Court's departure from probable cause would only be justified if it were "the deliberate choice of the people."[131] Likewise, the last words of his opinion suggest that the expansion of police power authorized by the majority require a "full debate by the people of this country."[132]

Though Douglas never seemed to restrain his rhetoric when writing from the bench, he wrote even more passionately away from the Court. In *Points of Rebellion*,[133] published two years after the *Terry* decision, Douglas praised America's promise of freedom in relation to totalitarian countries:

> After an American has been in a totalitarian country for several months, he is greatly relieved when he reaches home. He

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[130] *Id.* at 39.
[131] *Id.* at 38.
[132] *Id.* at 39.
[133] William O. Douglas, Points of Rebellion (RANDOM HOUSE 1970) (1969).

> feels that bonds have been released and that he is free. He can speak above a whisper, and he walks relaxed and unguarded as though he were no longer being followed.[134]

In the same essay, Douglas noted that America's freedom was under attack; he decried the growing authority of the government, particularly its tendency to empower police to oppress minorities, dissenters, and the poor through constant surveillance, investigations without due process, and other invasions of privacy. "[A] vast bureaucracy now runs the country," Douglas wrote, "irrespective of what party is in power."[135] Citing FBI wiretaps,[136] government employment screening,[137] and electronic surveillance,[138] Douglas expressed his fear that "Big Brother in the form of an increasingly powerful government . . . will pile the records high with reasons why privacy should give way to . . . law and order."[139]

Douglas specifically noted race as a "source of dissent,"[140] pointing out that "[t]he constitutional battle of the Blacks has been won, but equality of opportunity has, in practice, not yet been achieved. There are many, many steps still necessary."[141] Douglas wrote that "[p]olice practices are anti-Negro."[142] He lamented the growing authority of police officers to make discretionary arrests in order to advance discriminatory agendas:

> Many cities make being poor a crime. A man who wanders about looking for a job is suspect; and he and his kind are arrested by the thousands each year. The police, indeed, use "vagrancy" as the excuse for arresting people on suspicion—a wholly unconstitutional procedure in our country.[143]

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[134] *Id.* at 3.
[135] *Id.* at 54.
[136] *Id.* at 29-30.
[137] *Id.* at 16-29.
[138] *Id.* at 30-31.
[139] *Id.* at 29.
[140] *Id.* at 44.
[141] *Id.* at 94.
[142] *Id.* at 45.
[143] *Id.* at 47.

The Justice further complained that gross violations of privacy are accepted even in the investigation of minor transgressions: "[A] person on welfare has no Fourth Amendment rights: the police are empowered to kick down the door of his home at midnight without any search warrant in order to investigate welfare violations."[144] Douglas asked, "Does social and economic justice always serve a secondary role in our society?"[145] After proposing a series of modifications to social policies, he predicted an imminent social and political revolution, stating that "[t]here are only two choices: A police state in which all dissent is suppressed or rigidly controlled; or a society where law is responsive to human needs."[146] He predicted "an explosive political regeneration"[147] demanding "measurable change."[148]

In Justice Douglas's view, reflected in his dissent in *Terry*, when one comes to America he does have to be afraid of the police. In his subsequent account of democracy, if the United States ever got to the point where the police had too much power, the people would demand "change." It is perhaps still too early to know whether Douglas was right on this score. His faith in the people, and their desire to be free, is unquestionably inspiring. Time will tell whether this faith was justified.

CONCLUSION

Two years before *Terry*, in *Miranda v. Arizona*,[149] the Supreme Court got radical, at least according to the way the police perceived its opinion. The Court required the police to give suspects a mini-lecture in criminal procedure: Before interrogating suspects, the police had to warn them that talking to the police was not in their best interests. There were the predictable concerns that law enforcement would be undermined, but now, more than forty years later, these concerns appear to have been misplaced. The police, resourceful and adaptable, still manage

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[144] *Id.* at 71.
[145] *Id.* at 65.
[146] *Id.* at 92.
[147] *Id.* at 97.
[148] *Id.* at 95.
[149] 384 U.S. 436 (1966).

to enforce the criminal law, including getting suspects to talk even after they have received the Miranda warnings. So one lesson of the aftermath of *Miranda* is that the police are capable of adapting to the requirements of the Bill of Rights, even when those requirements seem explicitly to hinder law enforcement's ability to investigate crime. If Justice Douglas had written the majority opinion in *Terry*, the police still could have watched Mr. Terry and his associates; they just would not have been able to forcibly detain them until they had probable cause that a crime was going to be committed. It is true that the ability to intervene earlier in the process might thwart some crimes, but that crime-prevention benefit has to be measured against the widespread animosity towards the police that the stop-and-frisk doctrine has caused. In some low-income and minority communities, many people strongly dislike the police, and one important reason for this is *Terry*. It makes these citizens less likely to cooperate with the police, which is ultimately as much a detriment for public safety as for democracy. As rhetorical wars—the "war" on drugs and the "war" on terrorism—seem to lead the United States further down the "long path" to totalitarianism, the full greatness of the Douglas dissent has yet to be appreciated. The only question is whether the ultimate appreciation will be as a cautionary tale that was heeded, better late than never, or as the prediction of a frightening future, which now has arrived.

WARRANTS FOR WEARING A WIRE: FOURTH AMENDMENT PRIVACY AND JUSTICE HARLAN'S DISSENT IN *UNITED STATES V. WHITE*

Catherine Hancock[*]

> A dissent . . . is an appeal to the brooding spirit of the law, to the intelligence of a future age.[1]

INTRODUCTION

Justice Harlan's dissent in *United States v. White*[2] appealed to a future age when all members of society will be allowed to "carry on" their "private discourse freely, openly, and spontaneously," without enduring the risk of government "eavesdroppers prying into their private affairs" by warrantless monitoring of their conversations through the use of "wired" listeners.[3] Justice Harlan's dissents comprised "nearly half" of the body of his judicial opinions,[4] but his *White* dissent was unusual for several

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[1] ALAN BARTH, PROPHETS WITH HONOR: GREAT DISSENTS AND GREAT DISSENTERS IN THE SUPREME COURT 3 (1974) (quoting CHARLES EVANS HUGHES, THE SUPREME COURT OF THE UNITED STATES 68 (1928)).

[2] 401 U.S. 745, 768 (1971) (Harlan, J., dissenting).

[3] *Id.* at 789-90. This Article uses the terms "bugged" or "wired" "listeners" to refer people with electronic devices that transmit a conversation to a monitoring government agent who may also be recording the conversation.

[4] TINSLEY E. YARBROUGH, JOHN MARSHALL HARLAN: GREAT DISSENTER OF THE WARREN COURT viii (1992) (noting that during 16 years, Harlan wrote 613 opinions, "more than any other justice of his era," including 296 dissents and 149 concurrences). *See also* Nathan Lewin, *Justice Harlan: "The Full Measure of the Man,"* 58 A.B.A. J. 579,

reasons. It did not support the government's position,[5] it advocated the overruling of precedent,[6] and it demonstrated how Harlan could change his mind. The government's position in *White* relied heavily on a prior Harlan opinion involving electronic surveillance.[7] But in his *White* dissent, Harlan observed that his own earlier approach "misconceive[d] the basic issue" by focusing "on the interests of a particular individual rather than evaluating the impact of a practice on the sense of security that is the true concern of the Fourth Amendment's protection of privacy."[8] If Harlan's thinking had changed before the Warren Court era ended, he could have authored a majority opinion on the *White* issue, instead of dissenting for a future age.[9] At the time of his *White* dissent, he could not have known that it would be one of the last opinions he would write.[10]

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583 (June 1972) (observing that Harlan would circulate a separate opinion when he could not agree with a draft majority or dissent, because he "felt it his duty to state his own reasons for reaching his result," and that "often" the author of the draft would respond with modifications that "might" lead Harlan to withdraw his separate opinion).

[5] *See* Norman Dorsen, *John Marshall Harlan*, *in* IV THE JUSTICES OF THE UNITED STATES SUPREME COURT: THEIR LIVES AND MAJOR OPINIONS 1401, 1406-08 (Leon Friedman & Fred L. Israel eds., 1995) [hereinafter THE JUSTICES] (noting Harlan's dissenting opinions supporting the government's position, including Griffin v. Illinois, 351 U.S. 12, 29 (1956); Douglas v. California, 372 U.S. 353, 360 (1963); Mapp v. Ohio, 367 U.S. 643, 672 (1961); Malloy v. Hogan, 378 U.S. 1, 14 (1964); Duncan v. Louisiana, 391 U.S. 145, 171 (1968); Fay v. Noia, 372 U.S. 391, 448 (1963); Henry v. Mississippi, 379 U.S. 443, 457 (1965)). *See also* Miranda v. Arizona, 384 U.S. 436, 207 (1966) (Harlan, J., dissenting); Escobedo v. Illinois, 378 U.S. 478, 492 (1964) (Harlan, J., dissenting).

[6] *White*, 401 U.S. at 795 (referring to On Lee v. United States, 343 U.S. 747 (1952), and concluding, "I would hold that *On Lee* is no longer good law").

[7] Brief for the United States, at 10, 13, 16, 17, 18, 19, 24, *White*, 401 U.S. 745 (No. 13), 1969 WL 120170 (relying on Lopez v. United States, 373 U.S. 427 (1963)).

[8] *White*, 401 U.S. at 788 n.24. *See infra* notes 328-30 and accompanying text.

[9] *See White*, 401 U.S. at 775 (recognizing that four members of the Court, not including Harlan, were ready to overrule *On Lee* when *Lopez* was decided in 1963). *Cf. id.* at 755 (Brennan, J., concurring in the result) (noting agreement with protection of privacy interest, and voting for reversal only on non-retroactivity grounds); *id.* at 756 (Douglas, J., dissenting); *id.* at 795 (Marshall, J., dissenting). *But see id.* at 745 (plurality opinion) (rejecting protection for privacy interest and also ruling against defendant on non-retroactivity grounds); *id.* at 754 (Black, J., concurring in the judgment) (supplying fifth vote for rejecting protection for privacy interest, relying on his lone dissent in Katz v. United States, 389 U.S. 347, 364 (1967), arguing that Fourth Amendment does not protect any conversations).

[10] *See id.* at 745 (plurality opinion) (decided April 5, 1971); YARBROUGH, *supra* note 4, at 335 (describing events that led to Harlan's death on December 29, 1971).

The value of Harlan's dissent grew as it receded into the past, as one of the best examples in the literary genre of judicial pedagogy in Fourth Amendment jurisprudence. Many clues in his opinion helped to explain the evolution of "privacy" precedents during the 50 years between the Court's first surreptitious surveillance case and the *White* decision.[11] His analysis brought to life the doctrinal dramas of the decade before *White*, when the Warren Court's precedents expanded the Fourth Amendment's boundaries while dissolving the iron grip of the Taft Court's limiting inscriptions in *Olmstead v. United States*.[12] Harlan authored some of those precedents,[13] and dissented in others.[14] But his *White* dissent was a testament to his support for all the Court's decisions envisioning the Fourth Amendment as a "regulatory canon requiring government to order its law enforcement procedures in a fashion that keeps us collectively secure."[15]

Harlan's dissent embodied his attempt to prevent the Court's voice from becoming "only a voice of power, not of reason."[16] His opinion provided a tour de force display of the workings of a passionate intellect. More than half of its over 9,000 words were devoted to demonstrating how the 1952 precedent of

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[11] *See* Gouled v. United States, 255 U.S. 298 (1921); Tracey Maclin, Hoffa v. United States: *Secret Agents in Private Spaces*, *in* CRIMINAL PROCEDURE STORIES 190-94 (Carol S. Steiker, ed., 2006) (identifying and analyzing *Gouled* as the first such decision).

[12] 277 U.S. 438 (1928).

[13] *See* Dorsen, *supra* note 5, at 1412, 1417 (noting Harlan's authorship of majority opinions ruling for defendants in Fourth Amendment cases, including, *inter alia*, Giordenello v. United States, 357 U.S. 480 (1958); Jones v. United States, 357 U.S. 493 (1958); Simmons v. United States, 390 U.S. 377 (1968); Mancusi v. DeForte, 392 U.S. 354 (1968)). *See also* Spinelli v. United States, 393 U.S. 410 (1969); Whiteley v. Warden, 401 U.S. 560 (1971).

[14] *See, e.g.*, Mapp v. Ohio, 367 U.S. 643, 672 (1961) (Harlan, J., dissenting); Wong Sun v. United States, 371 U.S. 471, 498 (1963) (Harlan, J., dissenting on probable cause issue); Camara v. Municipal Court, 387 U.S. 523, 546 (1967) (Clark, J., dissenting) (joined by Harlan); Berger v. New York, 388 U.S. 41, 89 (1967) (Harlan, J., dissenting).

[15] Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 367 (1974). *See* Philip B. Heymann, *in* JOHN MARSHALL HARLAN II, ASSOCIATE JUSTICE OF THE SUPREME COURT 1955-1971: REMEMBRANCES BY HIS LAW CLERKS (Norman Dorsen & Amelia Ames Newcomb, eds., 2001), *reprinted in* 27 J. SUP. CT. HIST. 138, 152 (2002) [hereinafter REMEMBRANCES] (observing that Harlan "followed the practice, with rare exceptions, of treating a decision from which he had dissented as fully entitled to his personal deference, as a precedent, after six months").

[16] *Mapp*, 367 U.S. at 686 (Harlan, J., dissenting).

On Lee v. United States[17] was undermined by many subsequent precedents, leaving its doctrine "wholly open for reconsideration."[18] The painstaking analysis of the living death of precedent was a Harlan trademark,[19] and his dissection of the history of *On Lee*'s fossilization symbolized his commitment to enabling Fourth Amendment doctrine to change with integrity vis-à-vis its past meanings. In this respect, Harlan's dissent served as a sharp contrast to the *White* plurality's analysis, which illustrated the Court's ability to resurrect precedent through retroactive immunization of doctrine from the vicissitudes of historical change.[20]

In his *White* dissent, Harlan demonstrated how judges may discover and interpret the Fourth Amendment principles that "were either dimly perceived or not fully worked out" in an earlier era.[21] He encouraged judges to guard against the danger that either "risk analysis" or the "expectations" approach "can, ultimately, lead to the substitution of words for analysis."[22] He urged judges to recognize their responsibility for the imposition of risks and expectations upon the citizenry,[23] and to assume that the answers to a "privacy" problem are to be found in the Fourth Amendment "tapestry," in which the "privacy" cases are interwoven with the "strands of doctrine" in the "search" cases.[24] His own words illustrated his quest for a wide-ranging and nuanced analysis of precedents as the necessary antidote to reliance on catchphrases or ahistorical understandings of doctrine. For Harlan, it was the whole of Fourth Amendment jurisprudence that required translation and explication in *White*. No precedent was an island, entire of itself. Every decision was a piece of the Fourth Amendment continent that could be understood only in the light of all the decisions that had come be-

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[17] 343 U.S. 747 (1952).

[18] United States v. White, 401 U.S. 745, 780 (1971) (Harlan, J., dissenting). *See* discussion *infra* Part III.B.

[19] *See, e.g.*, Gideon v. Wainwright, 372 U.S. 335, 349 (1963) (Harlan, J., concurring) (providing the exegesis for a "respectful burial" of Betts v. Brady, 316 U.S. 455 (1942)).

[20] *Cf.* discussion *infra* Part III.B.1 (examining *White* plurality's analysis of *On Lee*).

[21] *White*, 401 U.S. at 780.

[22] *Id.* at 786.

[23] *Id.*

[24] *Id.* at 783.

fore, and all that came after, including the concurrences and dissents that accompanied each one.[25]

Part I of this Article focuses on the portrayal of the *White* case in the introduction of the plurality opinion authored by Justice White, and takes a closer look at the facts of the government drug sting, the arguments of the parties, and the thicket of relevant precedents. Part II.A examines the concurrences by Justices Harlan and White in *Katz v. United States*,[26] the decision in which the Court formally overruled *Olmstead*, holding that conversations in a telephone booth are protected against electronic "bugging," and that such surveillance is subject to the warrant requirement.[27] The ideas expressed in these concurring opinions are useful to compare because they foreshadowed the approaches used in Justice Harlan's dissent and in Justice White's plurality opinion in *White*. Part II.B considers the first half of Harlan's dissent, in which he explained the historical reasons for the death of *On Lee* as controlling authority for *White*. Part II.C analyzes the second half of Harlan's dissent, where he addressed "the desirability of saddling" the expectation and risk of wired listeners upon society. His analysis centered upon his assessment of the nature of this surveillance technique and the "likely extent of its impact" upon an individual's sense of security.[28] Part III explores Harlan's understanding of the "expectations of privacy" concept after *Katz* and before *White*, and concludes with final reflections upon the impact of the White decision and the legacy of Harlan's dissent.

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[25] *Cf.* BARTH, *supra* note 1, at 14 (characterizing the Court as "a continuing body, linked to the past and to the future, in the deliberations of which predecessors are colleagues whose voices are never to be stilled," and quoting Justice Edward White's advocacy of "judicial continuity" in Pollock v. Farmers' Loan and Trust Co., 157 U.S. 429, 652 (1895) (White, J., dissenting)).

[26] 389 U.S. 347 (1967).

[27] *Id.* at 353, 358-59. *See* Transcript of Oral Argument at 34, *Katz*, 389 U.S. 347 (No. 35) (describing Katz's $300 fine for his conviction for transmitting wagering information by telephone); *id.* at 41 (noting that Katz was "one of the best handicappers in the country" for basketball games).

[28] *White*, 401 U.S. at 786.

I. THE GOVERNMENT'S DRUG STING AND THE THICKET OF PRECEDENTS

Two named characters appeared on the stage of the *White* plurality's opinion, but the decision provided no details to explain their actions or relationship. The defendant, James A. White, was sentenced to 25 years in prison for unspecified drug crimes. The government informer, Harvey Jackson, carried a concealed radio transmitter during his conversations with White, and these transmissions were monitored and overheard by unnamed federal agents.[29] On four occasions, their conversations took place in Jackson's home. As one agent watched the men from his observation post inside a kitchen closet, he saw, "through slightly open doors," the first heroin package change hands; during later episodes he saw deliveries of cash get counted.[30] This agent listened to the conversations "live," whereas two other agents heard them via the radio transmitter in a car across the street from Jackson's house.[31] The agents monitored four other conversations, including two in Jackson's car, one in a restaurant, and one in White's home. The agents testified about these conversations at White's trial, over the objection of his defense counsel. Jackson was not available to testify.[32] No other evidence was mentioned in the *White* plurality opinion. When White appealed his conviction, the circuit court reversed, finding the transmitted conversations were inadmissible under the Fourth Amendment.[33]

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[29] *Id.* at 746-47 (plurality opinion). *See* United States v. White, 405 F.2d 838, 840 n.2 (7th Cir. 1969) (en banc) (describing the "kel set" used by Jackson as a "small transistorized device which transmits voices or sound" to a radio transmitter receiving unit); Transcript of Oral Argument at 3, *White*, 401 U.S. 745 (No. 13) (noting that the device was "put on the chest under the clothing" of the informant, and that the device "will transmit for a mile or so").

[30] *White*, 405 F.2d at 840.

[31] *See White,* 401 U.S. at 746-47; Transcript of Oral Argument, *supra* note 29, at 5; Brief for the United States, *supra* note 7, at 3-8.

[32] *White*, 405 F.2d at 842; Brief for the United States, *supra* note 7, at 8 (noting that the government was unable to locate and produce Harvey Jackson as a witness, and that Jackson's wife testified that she had seen her husband the "previous evening" but "did not know where to locate" him on the day of trial).

[33] *White*, 405 F.2d at 848.

The *White* plurality assigned three errors to the circuit court. First, that court interpreted *Katz* as overruling *On Lee*. Second, the circuit court interpreted the Fourth Amendment as prohibiting the introduction of the agents' testimony under the circumstances of the *White* case. Thus, the circuit court "misinterpreted both the *Katz* case and the Fourth Amendment."[34] Third, that court granted a new trial "without adverting to the fact that the transactions" in *White* "had occurred before *Katz* was decided," and thereby "erred in applying the *Katz* case to events that occurred before that decision was rendered."[35] This description of multiple errors cast a subtle aura of clumsiness upon the circuit court's decision, and additional references to the circuit court's mistaken "understandings" about doctrine further magnified this aura.[36]

The *White* plurality's dry recitation of the circuit court's errors did not disclose the reasoning for that court's interpretative choices about *Katz* and *On Lee*. Nor did the plurality explain the understandable reason for the circuit court's failure to "advert" to *Desist v. United States*,[37] which declared *Katz* to be nonretroactive, and which was not decided until two months after the circuit court's decision in *White*.[38] Immediately after deciding *Desist*, the Court granted review in *White*[39] because the justices were ready for another debate about an issue that had provoked disagreements in divided opinions for almost twenty years.[40] Ultimately, they preferred to issue an advisory opinion

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[34] *White*, 401 U.S. at 747.

[35] *Id.*

[36] *See id.* at 749, 750, 754.

[37] 394 U.S. 244 (1969).

[38] *Compare id.* at 244 (decided March 24, 1969) *with White*, 405 F.2d at 838 (decided January 7, 1969) (making no reference to any government argument about nonretroactivity in anticipation of the *Desist* holding).

[39] White, 405 F.2d at 838, *cert. granted*, 394 U.S. 957 (1969). *See White*, 401 U.S. 745 (argued on November 10, 1969, and reargued on October 20, 1970, presumably because the Court was divided 4 to 4 during the 1969 Term). *Compare* Fred Graham, *Abe Fortas*, in IV THE JUSTICES, *supra* note 5, at 1451, 1462-64 *with* Dennis Hutchinson, *Harry A. Blackmun*, in IV THE JUSTICES, *supra* note 5, at 1607, 1608-13 (explaining how Justice Fortas resigned on May 16, 1969, and was not replaced with Justice Blackmun until June 9, 1970).

[40] *See, e.g.*, On Lee v. United States, 343 U.S. 747 (1952); *id.* at 758 (Frankfurter, J., dissenting); *id.* at 765 (Burton, J., dissenting); *id.* at 762 (Douglas, J., dissenting); Lopez

on the question concerning the viability of *On Lee*,[41] instead of waiting for the opportunity to review that issue in a case tried after *Katz* was decided.[42]

The *White* plurality's description of the government's sting operation was more succinct than those provided in the circuit court's opinion and in the briefs and arguments in the Supreme Court. There were at least six agents involved in an operation that lasted for four weeks before ending in White's arrest on a street in Chicago.[43] White made three deliveries of heroin to Jackson, and always collected cash payments later, sometimes in two installments.[44] After making the first delivery of heroin to Jackson's home, White made two subsequent deliveries during arranged meetings in Jackson's car. White collected cash payments three times at Jackson's home, and Jackson brought other payments to White's home and to the restaurant.[45] Jackson's wire enabled the agents to listen to numerous incriminating remarks by White during each delivery and collection event.[46] The agents tailed White and Jackson by car during the

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v. United States, 373 U.S. 427 (1963); *id.* at 441 (Warren, C.J., concurring in the result); *id.* at 446 (Brennan, J., dissenting).

[41] *See* Donald L. Doernberg, *"Can You Hear Me Now?": Expectations of Privacy, False Friends, and the Perils of Speaking Under the Supreme Court's First Amendment Jurisprudence*, 39 IND. L. REV. 253, 282 (2006) (observing that "almost the entire opinion is advisory" in *White*). *Cf.* Transcript of Oral Argument, *supra* note 29, at 14, 15 (urging the Court "not to decide the case on retroactivity but on the importance of the law question" because of "the importance of law enforcement of getting" that question decided, and noting that the government had twenty-two cases pending in the Court which involved the *White* issue, none of which had been tried before *Katz*).

[42] *See White*, 401 U.S. at 754. *Cf.* Transcript of Oral Argument, *supra* note 29, at 23 (arguing that *Desist* did not apply to *White* because *Desist* held that *Katz* was prospective only "as to things that *Katz* departed from in previous holdings" of the Court, and that under the law before *Katz*, the defendant would prevail on the Fourth Amendment claim "without *Katz*"); *White*, 401 U.S. at 793-95 (Harlan, J., dissenting) (endorsing the argument that *Desist* did not apply to *White*).

[43] *White*, 405 F.2d at 840-42.

[44] *Id.*

[45] *Id.* (noting that Harvey Jackson paid $1,360 for the first sale of "one good ounce" of heroin, $1,250 for "two more ounces," and $2,250 for a third "package"; he agreed to pay $2,250 for the fourth delivery that did not occur because of White's arrest). *See* Brief for Respondent at 3, *White*, 401 U.S. 745 (No. 13), 1969 WL 120169.

[46] *See White*, 405 F.2d at 840-42. *Cf.* Transcript of Oral Argument, *supra* note 29, at 11 (noting that Jackson called White once from a telephone booth to arrange a meeting and brought an agent into the booth to listen to the call).

second and third delivery events.[47] A similar pattern was observed each time. One agent watched as White picked up his source, then dropped off his source and picked up Jackson, and finally passed along the package from the source. During their third observed meeting, White and his source were arrested at a bus stop, just as the source handed him a briefcase containing heroin.[48]

These facts about the sting operation in *White* illustrated the way in which the Court could have implemented the defendant's proposed warrant requirement for the use of wired listeners like Jackson.[49] Counsel for the government in *White* observed, "[N]early all of these informants are themselves addicts that are used by the investigatory body to make the [drug] purchase[s]."[50] Assuming that government agents could obtain the assistance of an informant to gather probable cause evidence by making a drug purchase without wearing a wire, then the agents could use this evidence to obtain judicial approval for continuing the sting with a wire on the informant during future meetings with the targeted drug seller. According to the Court's discussion in *Berger v. New York*, in order to conduct a wiretap or plant "bugs," government agents would need to obtain a judicial order based on probable cause, which would establish the parameters for the "nature, scope or duration" of the electronic surveillance.[51] Only this type of judicial preauthorization system would satisfy the Fourth Amendment.[52] Defense counsel in *White* relied on *Berger* to argue that similar judicial safeguards should be required for using a transmission "bug" on a wired listener.[53] But *Berger* was only one decision in a thicket of relevant precedents.

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[47] *White*, 405 F.2d at 841-42.

[48] *Id.* at 842. *Cf.* Brief for the United States, *supra* note 7, at 3-8 (indicating that the source was White's co-indictee).

[49] Brief for Respondent, *supra* note 45, at 2; Transcript of Oral Argument, *supra* note 29, at 24-25.

[50] Transcript of Oral Argument, *supra* note 29, at 4.

[51] Berger v. New York, 388 U.S. 41, 54-60, 63 (1967).

[52] Maclin, *supra* note 11, at 202.

[53] Brief for Respondent, *supra* note 45, at 11, 12, 20.

The Court's earliest Fourth Amendment ruling against the government in an informant case came in *Gouled v. United States*, in which a false-friend informant pretended to make a social call on a defendant in his office, and in his absence, carried away an incriminating paper.[54] The Court treated this event as a search and seizure "by stealth" that should be equated with a search and seizure conducted by means of force or coercion.[55] More than thirty years later, the *On Lee* Court held that a similar pretense did not constitute an unlawful search and seizure when the false-friend informant was a wired listener whose conversation with the defendant was transmitted to a monitoring government agent with a "receiving set" that allowed him to hear it.[56]

The *On Lee* Court relied on *Goldman v. United States*, which held that no search or seizure occurred when unseen agents used a device to listen to magnified conversations through an office wall.[57] The *Goldman* ruling, in turn, extended the logic of *Olmstead*, which held that agents who listened to wiretapped conversations on home and office telephones committed no search or seizure.[58] The *Olmstead* Court reasoned that the text of the Fourth Amendment could not be interpreted either to treat intangible conversations as tangible "effects" or "things," or "to apply the words search and seizure as to forbid hearing or sight."[59] The Court observed that the tapped telephone wires were "not part of" the defendant's "house or office," and the conduct of the government agents did not fit any of the three categories of searches and seizures recognized in prior cases.[60] Those categories included only a seizure of the "person," a seizure of tangible material "effects," or a "physical invasion" of a person's "house or 'curtilage' for the purpose of making a

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[54] 255 U.S. 298 (1921).

[55] *Id.* at 305-06. *See* Maclin, *supra* note 11, at 190-92.

[56] On Lee v. United States, 343 U.S. 747, 749, 751 (1952). *But see supra* note 40 (citing *On Lee* dissents).

[57] Goldman v. United States, 316 U.S. 129, 131-32, 135 (1942). *But see id.* at 136 (Murphy, J., dissenting); *id.* at 136 (Stone, J. and Frankfurter, J., filing statements that they would have joined a Court majority to overrule *Olmstead*).

[58] Olmstead v. United States, 277 U.S. 438, 464-66 (1928).

[59] *Id.* at 465.

[60] *Id.* at 466.

seizure."[61] Subsequent precedents viewed *Olmstead* as relying on a "trespass" rationale because the Court observed that the wires were tapped "without trespass upon any property."[62]

Almost twenty years after *On Lee*, the Court took up another electronic eavesdropping case in which no informant was involved. In *Silverman v. United States*,[63] the Court found that the interception of conversations could violate the Fourth Amendment, thus implicitly recognizing that the human ear could commit the seizure of a conversation, and that an intangible conversation could receive the constitutional protection given to tangible "effects" or "things."[64] However, the Court found it unnecessary to reconsider the narrow holdings of *Olmstead* and *Goldman* because the agents in *Silverman* committed a "physical invasion" into a "constitutionally protected area" that was missing in the earlier cases.[65] The agents had inserted a microphone into the wall of a house and monitored the conversations of the individuals within.[66] Soon thereafter, in *Lopez v. United States*, the Court encountered a case in which an official-turned-undercover-agent used only a recording device when conversing with a defendant who had tried to bribe him during an earlier encounter.[67] Instead of treating *On Lee* as controlling precedent, the Court determined that the recording was admiss-

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[61] *Id. Cf.* Amsterdam, *supra* note 15, at 382 (noting that *Olmstead* reasoned both that "the ear cannot commit a search or a seizure" and that "the tap of the telephone wire was not an intrusion into any area protected by the Constitution in favor of the phone owner", because the telephone wires "are not part of his house or office"). *But see id.* at 485, 487 (Butler, J., dissenting) (reasoning that "tapping the wires and listening in by the officers literally constituted a search for evidence"); *id.* at 471-85 (Brandeis, J., dissenting); *id.* at 469-71 (Holmes, J., dissenting).

[62] *See, e.g.*, Silverman v. United States, 365 U.S. 505, 510-11 (1961) (citing *Olmstead*, 277 U.S. at 457).

[63] *Id.*

[64] *Id.* at 511-12. *See* United States v. White, 401 U.S. 746, 768, 775 n.9 (1971) (Harlan, J., dissenting) (noting that *Silverman*'s "unspoken premise" was articulated in Wong Sun v. United States, 371 U.S. 471, 485 (1963), namely "that the Fourth Amendment may protect against the overhearing of verbal statements").

[65] *Silverman*, 365 U.S. at 508-10.

[66] *Id.* at 509, 512 (describing how the "spike mike" device made contact with the heating system of the house, which acted as a sounding board). *Cf.* Clinton v. Virginia, 377 U.S. 458 (1964) (applying *Silverman* to require exclusion of conversations monitored by use of a spike mike that was stuck in the wall with penetration comparable to thumb tack).

[67] Lopez v. United States, 373 U.S. 427, 430 (1963).

ible because no unseen government agent monitored the conversation, and because the recording was used at trial to corroborate the official's testimony as to what he had heard.[68]

In the Court's last informant cases before *White*, a trilogy of decisions on the same day reached the same result, finding that no search or seizure occurred. In *Lewis v. United States*, an undercover agent accepted the defendant's "invitation" to enter his home in order to conduct an illegal drug transaction, and testified later concerning their conversations.[69] The *Lewis* Court distinguished *Gouled* because the *Lewis* agent neither saw, nor heard, nor took anything not contemplated by the defendant as part of that transaction; the Court distinguished *Silverman* because no unseen government agents monitored the conversations.[70] In *Hoffa v. United States*,[71] the false-friend informant was not monitored, and thus the defendant's "misplaced confidence" that the informant would not be a government "plant" and would not disclose incriminating conversations to his government supervisors "was not protected by the Fourth Amendment."[72] In *Osborn v. United States*, the false-friend informant recorded the defendant's conversation, like the official-turned-undercover-agent in *Lopez*.[73] However, the *Osborn* Court did not rest its decision upon the "foundation of the Court's opinion in *Lopez*," but upon "the narrower compass" of the *Lopez* dissent and concurrence, which approved of the use of a recording device by an informant-agent when that use was authorized ahead of time by judicial order, as in *Osborn*.[74]

Faced with the "highly uncertain" state of the governing principles for the use of wired listeners and of electronic surveillance generally,[75] the government counsel in *White* said almost

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[68] *Lopez*, 373 U.S. at 438. *Cf.* Maclin, *supra* note 11, at 201-02, 203-04.

[69] 385 U.S. 206 (1966).

[70] *Id.* at 210, 212.

[71] Hoffa v. United States, 385 U.S. 293 (1966).

[72] *Id.* at 302. *Cf.* Maclin, *supra* note 11, at 206-11.

[73] 385 U.S. 323 (1966).

[74] *Id.* at 327-29.

[75] Kent Greenawalt, *The Consent Problem in Wiretapping & Eavesdropping: Surreptitious Monitoring with the Consent of a Participant in a Conversation*, 68 COLUM. L. REV. 189, 202 (1968) (explaining that "the primary conclusion to be drawn about the constitutionality of use of electronic devices by a participant, or with a participant's

nothing about *On Lee*, arguing instead that *Lopez*'s holding concerning a recording device should be expanded and applied to a transmission device.[76] In the government's view, the wired informant in *White* consented to the government's monitoring of his conversations with the defendant. That fact distinguished *Katz*, which did not involve an informant.[77] Relying on *Hoffa*, the government argued the *White* defendant must have recognized the risk that the informant Jackson could be an unwired government informant who would disclose his conversations to government agents.[78] Thus, the risk of disclosures by the reporting informant in *Hoffa* could be equated with the risk of transmission disclosures to unseen agents by the wired informant in *White*.[79]

The defense counsel's brief in *White* relied on *Gouled*, *Silverman*, *Osborn*, *Berger*, and *Katz*, and reasoned that hiding a transmission "bug" on the informant Jackson was no different from planting a "bug" in White's house. This government inva-

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consent, to record or transmit the words of a non-consenting party is that the governing principles are now highly uncertain").

[76] *See* Brief for the United States, *supra* note 7, at 14-16, 18-19, 21, 24-25, 28 (referring to arguments based on *Lopez*); *id.* at 28 (citing *On Lee* as an example of a rule that "electronic surveillance without a trespass did not violate the Fourth Amendment," and circuit courts following the *On Lee* rule on the *White* issue before *Katz*); Transcript of Oral Argument, *supra* note 29, at 14 (mentioning these decisions).

[77] *See* Brief for the United States, *supra* note 7, at 10; Transcript of Oral Argument, *supra* note 29, at 11.

[78] Brief for the United States, *supra* note 7, at 9, 14.

[79] *See id.* at 20 (citing Justice White's concurrence in *Katz*). *See also infra* text accompanying note 134. At oral argument, the government counsel also emphasized that, "this is not an *On Lee* situation, where the government used an old friend after indictment of the defendant to extract an admission or confession of a past event," but a situation in which the agents were listening "to the event itself happen, to the crime being committed, in the consummation of a commercial transaction" between parties whose relationship should not be "protected in the sense of a right of expectation of privacy." Transcript of Oral Argument, *supra* note 29, at 8, 10. The government counsel may have sought to distinguish the use of the wired informant in *White* from the *On Lee* "situation" because the *On Lee* defendant was indicted, and at the time *White* was argued and decided, the Sixth Amendment right to counsel had been extended to the pre-indictment arrest phase by Escobedo v. Illinois, 378 U.S. 478 (1964). Therefore, the protections of Massiah v. United States, 377 U.S. 201 (1964), which prohibited the use of an informant or undercover government agent to deliberately elicit statements from an indicted defendant, arguably applied to an arrested defendant and possibly to others. *Cf.* Greenawalt, *supra* note 75, at 198 (observing that *Escobedo* does not reveal "how far *Massiah* will be expanded in regard to statements elicited by informers").

sion required compliance with the warrant requirement under *Berger*.[80] The government's reliance on *Hoffa* was deemed "misplaced" because "no electronic interception or transmission" of conversations occurred there, and because the *Hoffa* Court noted that the unwired informant was not transmitting to "surreptitious eavesdroppers."[81] The *Lopez* decision was distinguished on the basis of its facts and narrow rationales that had no application in *White*, where an unseen government agent did monitor the conversation, and the transmitting device did capture more than what the wired informant heard.[82] As for *On Lee*, defense counsel commented at oral argument, "I don't know if the government is urging that *On Lee* is still good law or whether they are not."[83] The defense counsel also argued the defendant "would prevail" even without relying on *Katz*, if the Court would "turn back the hands of time" and consider the case under the law as it "was before *Katz*."[84] These arguments provided the seeds of the ideas that Justice Harlan developed by in his *White* dissent.

II. HARLAN'S DISSENT: CHALLENGING THE DEAD HAND OF THE PAST

In Harlan's "preliminary observations" about the issue in *White*, his dissent exhibited a dramatic contrast to the plurality's low-key summary of the case as an occasion for the correction of a wayward lower court.[85] Harlan explained that numerous electronic devices had made "technologically feasible the Orwellian Big Brother," and that "tens of thousands of times each year, throughout the country," informants and undercover officers used such devices, including wire transmitters that

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[80] Brief for Respondent, *supra* note 45, at 9, 11-13.

[81] *Id.* at 14 (citing Hoffa v. United States, 385 U.S. 293, 302 (1966)).

[82] *Id.* at 16-17.

[83] Transcript of Oral Argument, *supra* note 29, at 28. *Cf.* United States v. White, 405 F.2d 838, 847 (7th Cir. 1969) (en banc) (indicating that "[t]he government's principal reliance is placed on the decision in *On Lee*").

[84] Transcript of Oral Argument, *supra* note 29, at 23 (responding to questions about non-retroactivity of *Katz*).

[85] *White*, 401 U.S. at 769 (Harlan, J., dissenting).

broadcast conversations, free from judicial scrutiny.[86] Harlan saw the issue of unregulated wired listeners as one of great magnitude, because of the prevalence of this surveillance technique and because "the factors that must be reckoned with . . . are . . . subtle and complex," doctrinally difficult to weigh "in the Fourth Amendment balance," and the source of "sharp differences of opinion both within and without the judiciary."[87]

However, Harlan had no hesitancy in expressing his conclusion that the 1952 decision in *On Lee* had been allowed to "govern official behavior . . . in spite of the subsequent erosion of its doctrinal foundations."[88] In his view, *On Lee* was overdue for reassessment, and his analysis of "important constitutional developments since *On Lee*" led him to conclude "that *On Lee* can no longer be regarded as sound law."[89] These developments occurred during the almost twenty year period between *On Lee* and *White*, and illustrated the Court's altered "perception of the scope and role of the Fourth Amendment."[90] In essence, subsequent precedents impeached *On Lee* before it could be overruled as a formality, and therefore the Court was required to consider the *On Lee* problem anew.[91]

As for *Katz*, Harlan emphasized that this decision was not a turning point in the demise of *On Lee*, and that the doctrine of *On Lee* had become "wholly open for reconsideration . . . since well before *Katz* was decided."[92] Harlan defined his initial mission as the exercise of "tracing carefully the evolution of Fourth Amendment doctrine" in decisions after *On Lee*, in order to liberate the debate in *White* from the dead hand of unsound doc-

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[86] *Id.* at 768, 770 (quoting ALAN WESTIN, PRIVACY AND FREEDOM 131 (1967)). *Cf. id.* at 770 n.2 (quoting WESTIN, *supra*, at 131) (noting that electronic devices are used in investigations of crimes involving narcotics, gambling, prostitution, corruption of public officials, extortion, and conspiracy; they are also used "to unearth 'political crimes,'" by agents who attend the public and private meetings of suspect groups).

[87] *Id.* at 770-71.

[88] *Id.* at 769.

[89] *Id.*

[90] *Id.*

[91] *Id.*

[92] *Id.* at 780. *Cf. id.* at 769 (observing also that "it requires no discussion of the holding in *Katz*, as distinguished from its underlying rationale as to the reach of the Fourth Amendment, to comprehend the constitutional infirmity of *On Lee*").

trine.[93] He defined his second mission as the explication of the reasons why, "under our system of government, as reflected in the Constitution," the Court should not "impose on our citizens the risks of the electronic listener or observer" without the protection of a warrant requirement.[94]

Harlan's dissent candidly addressed one of the most vexing difficulties involved in interpreting the privacy precedents during the years before *White*, which derived from the Court's tradition of silence concerning the implications of departures from the logic of *Olmstead*, *Goldman*, and *On Lee*. These cases became symbols of the Court's efforts "to live as long as it could with decisions made in the past,"[95] and citations to the rationales or holdings in *Olmstead* and *On Lee* appeared in decisions that implicitly retreated from those holdings or rationales.[96] This custom of using *Olmstead*-observant language, while relying on *Olmstead*-evasive reasoning, made it extremely difficult to identify the cases in which the law actually changed, and this difficulty could persist for years.[97]

Harlan expected that a "discerning lawyer" would recognize this difficulty,[98] and would adapt to it by characterizing the status of any privacy issue in scrupulously nuanced terms, as when he identified "the question of whether a conversation could be the subject of a 'seizure' for Fourth Amendment purposes" as

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[93] *Id.* at 773.

[94] *Id.* at 786.

[95] BARTH, *supra* note 1, at 20 (referring to consequence of Court's "fidelity to *stare decisis*" generally in the era before *White*).

[96] *See, e.g.*, Silverman v. United States, 365 U.S. 505, 512 (1961) (declining to reexamine *Goldman* but also declining to go beyond it "by even a fraction of an inch").

[97] *See, e.g.*, Brief of Petitioner at 10, Katz v. United States, 389 U.S. 347 (1967) (No. 35), 1967 WL 113605 (noting how "[a]fter *Silverman*, much confusion existed as to whether this Court had abandoned the physical trespass test enunciated in *Goldman* or whether *Silverman* represented the new philosophy of the Court"); *White*, 401 U.S. at 775 n.9 (observing that *Silverman* implicitly "would seem to have eliminated any lingering uncertainty" that verbal communication was protected by the Fourth Amendment, and that this "unspoken premise of *Silverman*" was clearly articulated in Wong Sun v. United States, 371 U.S. 471, 485 (1963)).

[98] *White*, 401 U.S. at 776 (criticizing the government's brief in *White* for citing *Lopez* as a reaffirmation of *On Lee*, because to "the discerning lawyer," *Lopez* "could only give pause, not comfort" and could "hardly be thought to have nurtured the questionable rationale" of *On Lee*).

"yet an unanswered if not completely open question" in 1952.[99] Harlan refused to pretend that any precedent could be treated as a simple artifact whose meaning was synonymous with its result, and he assumed the relationship between precedents could not be ascertained merely by observing that one case cited another.[100] He further expected observers to recognize that the Court's custom of citing a case "without disavowal of its holding" was entirely consistent with "the failure to reaffirm" the reasoning of that case.[101]

In order to speak accurately about the ambiguities of the Court's long, slow journey away from *Olmstead*, Harlan liked to speak metaphorically about precedent, and to personify the *Olmstead* progeny in order to track the stages of their declining health. Regarding the fatal prognosis for *Olmstead* and *On Lee*, Harlan declared that no decision after 1963 gave the "breath of life to the reasoning that led to the *On Lee* and *Olmstead* results," and so "it required little clairvoyance to predict the demise of the basic rationale of *On Lee* and *Olmstead*."[102] As for the timing of *Olmstead*'s demise, Harlan declared it was given a "quiet burial" in *Berger* before *Katz* gave it "last rites."[103]

Harlan treated the concurrences and dissents of his colleagues as essential sources for assessing the degree of "erosion"

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[99] *Id.* at 773 & n.5 (noting that the *On Lee* Court did not reach this question, the answer to which "was still unclear after *Goldman*" in 1942).

[100] *Id.* at 777.

[101] *Id.* (characterizing the significance of the citation of *On Lee* in his *Lopez* majority opinion in these terms). *Cf.* Transcript of Oral Argument, *supra* note 27, at 25 (revealing that when government counsel in *Katz* argued that "in the *Berger* case [the Court] did cite *Goldman*," Justice Black responded, "I don't think – they indicated [that] opinion was to be valid. Those cases were cited because they were somewhere in the realm.").

[102] *White*, 401 U.S. at 777. *See also id.* at 775-76 (noting that although the *Lopez* Court "declined to follow the course" of "sounding the death knell for *Olmstead* and *On Lee*," four members of that Court "were prepared to pronounce *On Lee* and *Olmstead* dead," reasoning that "[t]he pyre . . . had been stoked by decisions like *Wong Sun* . . . and . . . *Silverman*") (citations omitted).

[103] *Id.* at 780 (observing that even "[i]f *Berger* did not flatly sound a dirge for *Olmstead*, it articulated principles that led Mr. Justice Douglas, by way of concurrence, to comment on its quiet burial"). *See also id.* (concluding that "[a]t most [*Katz*] was a formal dispatch of *Olmstead*" and that *Katz* thereby "freed from speculation what was already evident, that *On Lee* was completely open to question").

in the "doctrinal foundations" of *Olmstead* and *On Lee*.[104] He assumed that opinions for Court majorities would not attempt to reconcile their *Olmstead*-observant language with their *Olmstead*-evasive reasoning. Therefore, each Court opinion needed to be examined through the lens of the accompanying presentations of justices who had the freedom to speak with greater candor and clarity about "the undercurrents" of doctrinal evolution that drew into question "the vigor of earlier precedents."[105] Harlan valued concurrences and dissents because he wrote many of his own,[106] and his concurrence in *Katz* foreshadowed some of the ideas he would develop in his *White* dissent. Even more dramatically, Justice White's concurrence in *Katz* staked out the answer he planned to offer when the issue in *White* arrived at the Court. Without joining issue with each other, each justice claimed that a different tacit understanding existed on the Court concerning the proper interpretation of Justice Stewart's ambiguous opinion for the *Katz* majority.[107]

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[104] *See, e.g., id.* at 769, 778 n.12, 780 (citing *On Lee* dissents, *Lopez* dissent, and *Berger* concurrence).

[105] *Id.* at 778, 784. *Cf. id.* at 769 (describing how *On Lee* "continued to govern official behavior" involving the warrantless use of wired listeners "in spite of the subsequent erosion of its doctrinal foundations").

[106] Lewin, *supra* note 4, at 583 (observing that Harlan became "among the most prolific of the Court's opinion writers" because of the number of his concurrences and dissents).

[107] *Compare* Katz v. United States, 389 U.S. 347, 360-62 (1967) (Harlan, J., concurring) *with id.* at 362-64 (White, J., concurring). *Cf.* David A. Sklansky, Katz v. United States: *The Limits of Aphorism*, *in* CRIMINAL PROCEDURE STORIES 247, 248 (Carol S. Steiker, ed., 2006) (observing that "the most striking thing" about the *Katz* Court's reasoning "was how vague and ambiguous it was," and that the "affirmative case" for the holding "was left largely unstated"); THOMAS K. CLANCY, THE FOURTH AMENDMENT: ITS HISTORY AND INTERPRETATION 59 (2008) (noting that the *Katz* Court's "embrace of privacy was not without reservation and [Justice] Stewart did little to explain what he meant by the term"); Edmund W. Kitch, Katz v. United States: *The Limits of the Fourth Amendment*, 1968 S. CT. REV. 133, 137-38 (identifying ambiguities in *Katz* opinion, and noting that because of the Harlan concurrence, "it seems clear that the [majority] opinion is deliberately ambiguous").

A. Foreshadowings of the White *Debate in the* Katz *Concurrences*

1. Justice Harlan's Anchoring of *Katz* in Privacy Precedents

The implicit goal of Justice Harlan's *Katz* concurrence was to anchor the majority's holding in the precedential seabed of the Court's decisions.[108] But his portrayal of precedents was complicated by his penchant for elaborating upon the emerging connections between the privacy decisions. He displayed the same penchant in his *White* dissent, in which he opined that *Katz* added "no new dimension to the law."[109] Yet Harlan was provoked sufficiently by the *Katz* majority's opinion to offer his own explication of the result. His first step was to validate the *Katz* defendant's original and narrower argument,[110] stating:

> I join the opinion of the Court, which I read to hold *only* (a) that an enclosed telephone booth is an area where, like a home, and unlike a field, a person has a constitutionally protected reasonable expectation of privacy; (b) that electronic as well as physical intrusion into a place that is in this sense private may constitute a violation of the Fourth Amendment; and (c) that the invasion of a constitutionally protected area . . . is, as the Court has long held, presumptively unreasonable in the absence of a search warrant.[111]

Harlan saw no reason to cast doubt upon the continuing validity of the Court's tradition of making case-by-case additions

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[108] *Katz*, 389 U.S. at 360-62.

[109] *White*, 401 U.S. at 780 (Harlan, J., dissenting) (citations omitted).

[110] *Katz*, 389 U.S. at 349-50 (quoting the defendant's questions presented, namely whether a public telephone booth is a constitutionally protected area and whether a physical intrusion into such an area is necessary for a search and seizure). *See* Transcript of Oral Argument, *supra* note 27, at 1, 3 (explaining that when FBI agents discovered that Katz was making calls from a bank of three telephone booths, they put a stereophonic tape recorder on the roof of the middle booth, taped each of the microphones to the back of one of the booths, put an "out of order" sign on the third booth, and turned on the recorder whenever a radio report from the agent tailing Katz predicted Katz's imminent arrival).

[111] *Katz*, 389 U.S. at 360-61 (Harlan, J., concurring) (emphasis added) (citing Hester v. United States, 265 U.S. 57 (1924) (Fourth Amendment does not provide protection from visual surveillance in an "open field"); Weeks v. United States, 232 U.S. 383 (1914) (Fourth Amendment protects the home)).

to the category of "constitutionally protected areas."[112] Moreover, his invocation of this tradition grounded the *Katz* holding in precedents that involved traditional, non-electronic types of government intrusions, and thereby linked the government's surveillance in *Katz* to the warrant requirement.[113] Not until *Berger* did the Court explain how the warrant system and the probable cause requirement might be applied feasibly to wiretapping.[114] Neither Harlan's concurrence nor the *Katz* Court's opinion revealed that the defense counsel's original position assumed that protection of the defendant's conversations would require an absolute Fourth Amendment prohibition on recording them.[115] Only in the reply brief and at oral argument did defense counsel propose that the warrant system should be imposed on the government's bugging of the telephone booth.[116] Indeed, this argument was sufficiently novel that some lawyers and media commentators expressed surprise at its success in *Katz*.[117]

Harlan's reliance on the "constitutionally protected area" concept implicitly rejected the defense counsel's position at oral argument, which proposed that it was "the wrong initial in-

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[112] CLANCY, *supra* note 107, at 54 n.49 (quoting partial list of protected areas in Lanza v. New York, 370 U.S. 139, 143 (1962), including a house, a business office, a store, a hotel room, an apartment, an automobile, and a taxicab).

[113] *See* Amsterdam, *supra* note 15, at 388 (observing that the *Katz* Court "simply takes up the warrant requirement from the dwelling-entry cases and applies it routinely to the bugging of a public telephone booth"). *Compare* Brief for Respondent at 17-19, *Katz*, 389 U.S. 347 (No. 35), 1967 WL 113606 (arguing that even if the booth is a constitutionally protected area, it should not receive the same warrant protection as a home), *with* Transcript of Oral Argument, *supra* note 27, at 28 (arguing that the Fourth Amendment was designed to protect the public from trespass and that it arises from the right of the person to exclude others from an area under the person's control, which is not a characteristic of a public telephone booth).

[114] Sklansky, *supra* note 107, at 234-36 (explaining the reasons for the "considerable doubt regarding the validity of surveillance warrants" before the *Silverman* era).

[115] *See id.* at 242-45 (analyzing the new arguments of Katz's defense counsel in the reply brief and at oral argument concerning the need for a warrant).

[116] *See* Reply Brief for Petitioner at 2, *Katz*, 389 U.S. 347 (No. 35), 1967 WL 113607; Transcript of Oral Argument, *supra* note 27, at 4.

[117] *See* Sklansky, *supra* note 107, at 249-50. *Cf.* Samuel Dash, Katz - *Variations on a Theme by Berger*, 17 CATH. U. L. REV. 296, 303 & n.41 (1968) (describing the lack of a federal statute regulating "bugging" in the era before *Berger* and *Katz*, and the small number of state statutory provisions relating to this type of surveillance); SAMUEL DASH, RICHARD F. SCHWARTZ & ROBERT E. KNOWLTON, THE EAVESDROPPERS 430-37 (1959).

quiry" to ask whether any area is "constitutionally protected,"[118] and that the right to privacy should "follow[] the individual" so that a conversation in any setting might deserve Fourth Amendment protection.[119] To bolster this proposal, defense counsel emphasized that "the very first item of protection in the Fourth Amendment is 'persons,'" which "lends credence" to the view "that privacy does follow the individual."[120] The *Katz* Court echoed these sentiments in declaring that, "[w]herever a man may be, he is entitled to know that he will remain free from unreasonable searches and seizures,"[121] and "the Fourth Amendment protects people, not places."[122] The Court even endorsed the defense counsel's criticism of the "constitutionally protected area" doctrine, agreeing it provided no "talismanic solution to every Fourth Amendment problem."[123]

Harlan must have recognized the inconsistency between the Court's validation of these defense arguments and his own narrower interpretation of the *Katz* holding. But whatever he may have thought of the defense counsel's broad and vaguely worded propositions, he was determined to reaffirm the precedents challenged by defense counsel, even when the *Katz* opinion remained silent about these challenges. For example, Katz's defense counsel was asked at oral argument whether the Fourth Amendment should protect a conversation in a field from interception by means of a parabolic microphone one mile away.[124]

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[118] Transcript of Oral Argument, *supra* note 27, at 5; Reply Brief for Petitioner, *supra* note 116, at 4.

[119] Transcript of Oral Argument, *supra* note 27, at 7. *Cf.* Sklansky, *supra* note 107, at 237, 241 (contrasting the defense counsel's original questions presented with counsel's later shift away from them at oral argument).

[120] Transcript of Oral Argument, *supra* note 27, at 12.

[121] Katz v. United States, 389 U.S. 347, 359 (1967).

[122] *Id.* at 351.

[123] *Id.* at 351 n.9. *Compare* Transcript of Oral Argument, *supra* note 27, at 5, 7, *with Katz*, 389 U.S. at 350 (refusing "to adopt this formulation of the issues" using the idea of the "constitutionally protected area," and observing that "the correct solution of Fourth Amendment problems is not necessarily promoted by incantation of the phrase 'constitutionally protected area'") *and id.* at 351 (opining that the effort to decide "whether or not a given 'area,' viewed in the abstract, is 'constitutionally protected'" only "deflects attention" from the problem). *Cf.* Amsterdam, *supra* note 15, at 357 (observing that *Katz* "rejects the concept of 'constitutionally protected areas' as the exclusive formula of fourth amendment coverage").

[124] Transcript of Oral Argument, *supra* note 27, at 5.

The "open fields" doctrine granted no protection from visual surveillance, and Katz's defense counsel argued that the "open fields" doctrine should be overruled so that both visual and conversational privacy could be protected.[125] Without mentioning this defense argument, Harlan's concurrence referred twice to the "open fields" doctrine as established law.[126]

In the second step of his concurrence, Harlan acknowledged the Court's maxim concerning the protection of "people not places," but noted that the protection for "people" generally required a reference to a "place."[127] Then he described his understanding of "the rule that ha[d] emerged from prior decisions"—a "twofold requirement" demanding "first, that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.'"[128] These memorable phrases soon "came to be used by the Court as the predominant measure for the scope of the Fourth Amendment's protections" in most contexts.[129] But Harlan used these words as a framework for rejecting the government counsel's argument that privacy can exist only in areas in

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[125] *Id.* at 5, 11 (arguing, on behalf of defendant, for overruling Hester v. United States, 265 U.S. 57 (1924), because it should make no difference, with regard to the right to conversational privacy, "whether you're in an open field or in the privacy of your own home"). *But see* Transcript of Oral Argument, *supra* note 27, at 16-17 (arguing, on behalf of the government, that people in the open fields should remain unprotected equally from visual surveillance and from a parabolic microphone because they are in a "public area" and privacy is restricted to "some area in which there is a private interest").

[126] *Katz*, 389 U.S. at 360, 361 (Harlan, J., concurring) (contrasting protected telephone booth with unprotected open fields, and noting that "conversations in the open would not be protected against being overheard, for the expectation of privacy under the circumstances would be unreasonable," without mentioning the problem of the parabolic microphone).

[127] *Katz*, 389 U.S. at 361 (Harlan, J., concurring).

[128] *Id.* at 361. *Cf.* Orin S. Kerr, *The Fourth Amendment and New Technologies: Constitutional Myths and the Case for Caution*, 102 MICH. L. REV. 801, 822 (2004) (observing that Harlan saw his "'reasonable expectation of privacy framework' as a restatement of existing law").

[129] CLANCY, *supra* note 107, at 60. For possible sources of the phrase "reasonable expectation of privacy," see Brief for Respondent, *supra* note 113, at 15 (arguing that "[t]he rights of privacy . . . must be measured in terms of the reasonable expectations of a person"), and Transcript of Oral Argument, *supra* note 27, at 16 (revealing how Justice Fortas repeatedly used the phrase "reasonably expect" in his questioning).

which the speaker has a private interest in the premises, never in a public area.[130]

In Harlan's view, the government's interpretation of the concept of "constitutionally protected areas" was both narrower and more rigid than Harlan's own interpretation, and it was grounded in reasoning that ignored the precedents of *Silverman*, *Osborn, Berger* and others.[131] Those cases no longer supported the idea that "the Fourth Amendment was designed to protect the public from trespass by law enforcement officers."[132] Like the other justices in the *Katz* majority, Harlan wished to distinguish the protection of people from the protection of places, but for a different purpose. He wished to affirm the Court's broad concept of "constitutionally protected areas" while contradicting the government's proposition that it was only the legal right to exclude others from private premises that automatically gave rise to privacy for conversations.[133] As one counterexample, Harlan noted that a speaker's "statements" made in his home but exposed to the "'plain view' of outsiders" should not be protected, echoing the agreement of both counsel at oral argument that the Fourth Amendment would not protect a speaker who used a "loud enough voice" to be heard by someone outside his home when the windows were open.[134] By exhibiting "no intention" to keep his conversation to himself, this person exhibited no "actual" expectation of privacy.[135] Additionally, Harlan reasoned that although conversations "in the open" usually would not be protected, they should be protected in a "temporarily private place," like Katz's telephone booth or a taxicab, in which momentary "freedom from intrusion" could be

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[130] Transcript of Oral Argument, *supra* note 27, at 16-17.

[131] *See* discussion *infra* Part II.B.2.

[132] Transcript of Oral Argument, *supra* note 27, at 28. *See also* discussion *infra* Part II.B.2 (discussing pre-*Katz* precedents).

[133] Transcript of Oral Argument, *supra* note 27, at 28.

[134] Katz v. United States, 389 U.S. 347, 361; Transcript of Oral Argument, *supra* note 27, at 7. *Accord id.* at 27 (agreeing, on behalf of the government, that no protection should exist "if a man stood at the window of his home and talked to somebody outside in the garden in such a loud tone that people on the sidewalk could hear it").

[135] *Katz*, 389 U.S. at 361 (Harlan, J., concurring).

expected, even if a legal right to exclude did not exist.[136] These contrasting results could be characterized as scenarios involving different doctrinal judgments about the expectations that "society is prepared to recognize as 'reasonable.'"[137]

Another foreshadowing of Harlan's *White* dissent appeared in the end of his *Katz* concurrence, where he noted that the "overruling" of *Olmstead* had already occurred, as part of "the course of development evinced" during the previous six years in majority opinions from *Silverman* to *Berger*.[138] In Harlan's view, *Olmstead*'s holding "essentially rested on the ground that conversations were not subject to the protections of the Fourth Amendment,"[139] and *Silverman* "established that interception of conversations reasonably intended to be private could constitute a 'search and seizure.'"[140] Once *Olmstead* was impeached, only *Goldman* remained to be re-examined in *Katz*.[141] Harlan agreed that *Goldman* should be overruled, observing that its holding was "bad physics as well as bad law," because "reasonable expectations of privacy may be defeated by electronic as well as physical invasion."[142] In his *White* dissent, Harlan took a similar view of *On Lee* as a precedent whose time for re-examination and formal repudiation was overdue.

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[136] *Id.* (citing Rios v. United States, 364 U.S. 253 (1960), for privacy interest in taxi cab, observing that it is irrelevant that a telephone booth is "accessible to the public" when not in use); *id.* at 352 (quoting the *Katz* majority concerning the assumption of privacy exercised by a person who "shuts the door behind him, and pays the toll that permits him to place a call").

[137] *Id.* at 361 (Harlan, J., concurring).

[138] *Id.* at 362 n.* (citing Wong Sun v. United States, 371 U.S. 471 (1963), Berger v. New York, 388 U.S. 41 (1967), and Osborne v. United States, 385 U.S. 323 (1966)). *Cf.* Transcript of Oral Argument, *supra* note 27, at 9 (revealing Justice Harlan's questions whether *Olmstead* "already has been" overruled, "[w]ith a strong *sub silentio*" in *Berger*) (relying on Dr. George R. Conyne, legal historian at the University of Kent at Canterbury, for voice identification of Justice Harlan's voice on October 11, 2009, using recording of oral argument in *Katz*, *available at* http://www.oyez.org/cases/1960-1969/1967/1967_35/argument).

[139] *Katz*, 389 U.S. at 362 n.* (Harlan, J., concurring).

[140] *Id.* at 361-62.

[141] *Id.* at 362 (noting that the *Silverman* Court found it unnecessary to re-examine *Goldman*).

[142] *Id.* Justice Harlan's concurrence ended with the point that the *Katz* majority's opinion did not foreclose the future recognition of specific exceptions to the requirement of a warrant. *Id.*

2. Justice White's Proposal—What *Katz* Left Undisturbed

Justice White's concurrence in *Katz* included a footnote in which he declared that *Hoffa*, *Lopez*, *Osborn*, and *On Lee*—all of which involved undercover agents or informants—remained "undisturbed" by the *Katz* decision.[143] His reasoning implicitly constructed the foundation for the reasoning of his plurality opinion in *White*. Notably, Justice White's summary of the results in these precedents made no reference to the rationales used by the Court to explain the lack of Fourth Amendment protection for the conversations in each case. Instead, he characterized each of these precedents in broad terms, according to the method by which the government obtained the "evidence." As Justice White declared:

> In previous cases, which are undisturbed by today's decisions, the Court has upheld, as reasonable under the Fourth Amendment, admission at trial of evidence obtained (1) by an undercover police agent to whom a defendant speaks without knowledge that he is in the employ of the police [in *Hoffa* (1966)]; (2) by a recording device hidden on the person of such an informant [in *Lopez* (1963) and *Osborn* (1966)]; and (3) by a policeman listening to the secret micro-wave transmissions of an agent conversing with the defendant in another location [in *On Lee* (1952)].[144]

Justice White then followed this summary with three key sentences, which implicitly linked together the "risk" rationale of *Hoffa* with the recording scenarios of *Lopez* and *Osborn*, and most importantly, with the transmission scenario of *On Lee*. He reasoned as follows:

> When one man speaks to another he takes all the risks ordinarily inherent in so doing, including the risk that the man to whom he speaks will make public what he has heard. The Fourth Amendment does not protect against unreliable (or law-abiding) associates. . . . It is but a logical and reasonable extension of this principle that a man take the risk that his

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[143] *Id.* at 362 n.** (White, J., concurring).
[144] *Id.* (citations omitted).

> hearer, free to memorize what he hears for later verbatim repetitions, is instead recording it or transmitting it to another. The present case [*Katz*] deals with an entirely different situation, for as the Court emphasizes the [defendant] "sought to exclude . . . the uninvited ear," and spoke under circumstances in which a reasonable person would assume that uninvited ears were not listening.[145]

Justice White's collective invocation of *Hoffa*, *Lopez*, *Osborne*, and *On Lee* served to stack these precedents together as bricks in a small wall of doctrine, cemented together with his endorsement of the common doctrinal ground they shared in being "undisturbed" by *Katz*. Without descriptions of their accompanying rationales, the results in these decisions were portrayed implicitly as per se rules, which impression was enhanced by the enumerated, "black letter" style of Justice White's recitation. The ahistorical character of this singular wall of precedents was obscured by the simplicity of Justice White's promise that none of these cases needed to be reconsidered in the light of whatever meanings might be assigned to the *Katz* majority's opinion.

Justice White's inclusion of *On Lee* in this quartet of cases implicitly extended the decision's legitimacy, in spite of the *On Lee* Court's reliance on *Olmstead* and *Goldman*, now both overruled. The reference to *On Lee* also invited judges and lawyers to focus on *On Lee*'s relationship to *Katz*, rather than its relationship to all the pre-*Katz* precedents that might have "disturbed" it. Without this invitation, observers might not have noticed whether or not the *On Lee* decision was cited in Justice Stewart's *Katz* opinion. The fact that Stewart did not cite *On Lee* might be taken to imply either that *On Lee* was irrelevant to the *Katz* issue, or that Stewart ignored *On Lee* because of its controversial status as a member of the dying *Olmstead* family of cases. Justice White's reference to *On Lee* implied that the *Katz* Court's silence meant that *On Lee* was alive, and had been alive all along.

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[145] *Id.* (citations omitted).

However, Justice White's most significant statement was his pairing of the small wall of "undisturbed" informant precedents with his recommended "logical and reasonable extension" of *Hoffa*'s ascribed rationale to the scenario of the wired informant in *On Lee*. By offering up this proposal concerning the lack of need for Fourth Amendment protection against "unreliable associates" who are planted government informants, Justice White appeared to suggest that *Hoffa*'s rationale could retroactively justify *On Lee*'s result. His final assurance, that *Katz* involved an "entirely different situation" from the informant precedents, deflected attention away from consideration of the question whether the reasoning of *Katz* or the pre-*Katz* cases might be relevant to an endorsement of the "extension" of *Hoffa*'s "risk" analysis to the scenario of the wired listener.

Justice White's closing assurance also suggested that there was no need to consider the significance of the Court's repeated distinctions between the use of unwired listeners, like those in *Hoffa* and *Lewis* who simply reported back to their government supervisors, and the use of listeners like those in *On Lee*, *Lopez*, and *Osborn,* who possessed recording or transmitting devices. Implicitly, Justice White's comments signaled to observers that the "electronic eavesdropping" precedents he left unmentioned, such as *Berger* and *Silverman*, as well as the "search" cases of the same era, were irrelevant to the assessment the need for judicial regulation of the wired listeners used in *On Lee* and *White*.

Justice White's views in his *Katz* concurrence encapsulated the core arguments that he would make in his *White* plurality opinion. The only Justice from the Warren Court who joined his opinion in *White* was Justice Stewart, the author of the *Katz* opinion.[146] During the years between *Katz* and *White*, Justice White's assurances about the "undisturbed" status of *On Lee* and *Lopez*, and his proposed extension of *Hoffa*'s logic to justify the preservation of the *On Lee* holding, would be noticed. In the

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[146] *Id.* at 348. *See* Leon Friedman, *Byron R. White*, in IV THE JUSTICES, *supra* note 5, at 1575 (observing that Professor Philip Kurland described the 1971 term as "the year of the Stewart-White Court – because [Justices Stewart and White] voted with the majority in over ninety percent of the decisions that year").

White litigation, the circuit court dissenters and the government counsel relied on Justice White's *Katz* concurrence to advocate the constitutionality of the unregulated use of wired listeners.[147]

One key aspect of Justice White's concurrence in *Katz* later captured the attention of the circuit court judges, the government litigators in the Supreme Court, and the two justices who had not served on the *Katz* Court, Justice Blackmun and Chief Justice Burger. Justice White raised the question whether *Katz* had overruled *On Lee*, and determined that *On Lee* remained "undisturbed."[148] In order to escape from the various premises concealed within Justice White's frame, Justice Harlan spent more than half of his *White* dissent explaining why Justice White's question about *On Lee* was wrong, and what the right questions might be.

B. Reconstructing the Past: The Unrecognizable World of On Lee

The first half of Justice Harlan's dissent focused on the goal of explaining why "*Katz* added no new dimension to the law" with regard to the viability of *On Lee*.[149] Harlan concluded that despite the *Katz* Court's "formal dispatch of *Olmstead*," it "was already evident that *On Lee* was completely open to question" before the Court reached its decision.[150] Harlan's evidence for the death of *On Lee* included the privacy precedents that revealed the slowly degrading authority of *On Lee* starting in the early 1960s, which precedents also established three "sound

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[147] United States v. White, 405 F.2d 838, 848, 850-51 (7th Cir. 1969) (en banc) (Castle, J., dissenting); Brief for the United States, *supra* note 7, at 9, 12, 14, 16, 17. *See also White*, 405 F.2d at 851, 852 (Hastings, J., dissenting) (arguing that *On Lee* must be treated as "controlling and dispositive" until "it is set aside by the Supreme Court"). *But cf. id.* at 843, 847 (majority opinion) (noting that it was unclear how *On Lee* could have been "undisturbed" by *Katz*, given that *On Lee* had relied on *Olmstead*, which was overruled by *Katz*, and given that the Supreme Court had "on other occasions completely eroded the decisional basis of *On Lee*"); *id.* at 843-44 (observing that it was not clear why "*Katz* would have been decided differently if the recipient of the intercepted phone call had consented to the Government's bugging" as in *Hoffa*, and that it was difficult "to believe that such a meaningless form of consent would have rendered the defendant's overheard statements any more admissible in *Katz*").

[148] *See* Transcript of Oral Argument, *supra* note 29, at 23.

[149] United States v. White, 401 U.S. 745, 745 (1971) (Harlan, J., dissenting).

[150] *Id.* at 768, 780.

general principles for application of the Fourth Amendment that were either dimly perceived or not fully worked out at the time of *On Lee*."[151] These three general principles were: (1) "that verbal communication is protected by the Fourth Amendment;" (2) "that the reasonableness of a search does not depend on the presence or absence of a trespass;" and (3) "that the Fourth Amendment is principally concerned with protecting interests of privacy, rather than property rights."[152] For Harlan, "the primacy" of a fourth general principle emerged in his examination of the search cases during the same era: that "official investigatory action that impinges on privacy must typically, in order to be constitutionally permissible, be subjected to the warrant requirement."[153]

1. *On Lee*'s Trespass Rationale and Its Jurisprudential Identity Before *White*

Harlan began his "exposition of the dynamics of the decline of the trespass rationale underlying *On Lee*" with a simplified version of that rationale, explaining that Justice Jackson's opinion rejected the defendant's contention that the "deception" of the wired informant "vitiated" the defendant's "consent to his entry on the premises."[154] Thus, "in the absence of a trespass, no constitutional violation had occurred."[155] Harlan could have supplied more details about the intricacies of the trespass analysis in the *On Lee* opinion to illustrate his point that "*On Lee* rested on common-law notions and looked to a waning era of Fourth Amendment jurisprudence."[156] The *On Lee* defendant made four initial arguments in an attempt to raise the question left open in *Goldman*—whether the entry into an office to install

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[151] *Id.* at 780-81.
[152] *Id.* at 781.
[153] *Id.*
[154] *Id.* at 773, 774 & n.6.
[155] *Id.* at 774.
[156] *Id.*

a listening device might constitute a trespass, with the operation of the device serving as a "continuing trespass."[157]

The *On Lee* defendant's first losing argument was based on the proposition that "unlawful conduct" by the wired informant, after the defendant consented to his entry into the business premises, would constitute the tort of trespass *ab initio*.[158] Justice Jackson reasoned that even if the agent's conduct were assumed to be unlawful, the Court had ruled the trespass *ab initio* doctrine should not be extended beyond civil actions against the government to cases "where the right . . . to . . . use . . . evidence is involved."[159] The second losing argument was that the informant tortiously entered by fraud, as Justice Harlan noted.[160] Here Justice Jackson acknowledged the "orthodox tort law" was unclear as to whether an entry without any affirmative misrepresentation would be a trespass.[161] But he concluded that any such "fine-spun" tort doctrine similarly deserved rejection as "a fiction whose origin, history, and purpose do not justify . . . [its] application," according to the same precedent that rejected the relevance of the trespass *ab initio* doctrine.[162]

In his third losing argument, the *On Lee* defendant identified the government agent as a trespasser.[163] By sending the wired informant into the defendant's business premises, the agent gained the same access to their conversations that physical entry by the agent would have provided. Justice Jackson rejected this analogy as "frivolous" and then summarized the three types of trespassory entry that would allow the Court to reach the question left open in *Goldman*.[164] These included physical entry by force, physical entry by unwilling submission to authority, and physical entry without any express or implied

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[157] Goldman v. United States, 316 U.S. 129, 134-35 (1942) (noting that this question was unnecessary to decide where agents made such an entry but the listening device did not work).

[158] On Lee v. United States, 343 U.S. 747, 751-52 (1952).

[159] *Id.* at 752 (quoting McGuire v. United States, 273 U.S. 95 (1927)).

[160] *Id.*

[161] *Id.*

[162] *Id.* (citing WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS §18 (1971); *McGuire*, 273 U.S. at 95).

[163] *Id.*

[164] *Id.*

consent.[165] The entry by the wired informant matched none of these methods. The defendant's fourth losing argument relied on an analogy between the conduct of the wired informant in *On Lee* and the informant in *Gouled* who entered an office not by force but "by subterfuge or fraud."[166] Justice Jackson dismissed the analogy because *Olmstead* limited *Gouled*'s doctrine to a scenario where tangible property is seized by an informant.[167] Therefore, *Gouled* was inapposite to cases involving the use of "mechanical or electronic devices" to intercept conversations, "at least where access to the listening post was not obtained by illegal methods."[168]

Unexpected doctrinal drama arose in the *White* plurality opinion, thanks to the *On Lee* defendant's fifth argument—that *Olmstead* should be overruled.[169] After almost twenty years of judicial treatment as a "trespass" precedent, *On Lee*'s alternate identity was announced by the *White* plurality, without citation to the briefs or arguments of the parties, the arguments in the opinions below, the Court's own precedents, lower court opinions, or scholarly commentary. After acknowledging that the *On Lee* Court's trespass rationale "cannot survive *Katz*," the *White* plurality declared:

> But the [*On Lee*] Court announced a second and independent ground for its decision; for it went on to say that overruling *Olmstead* and *Goldman* would be of no aid to On Lee since he "was talking confidentially and indiscreetly with one he trusted, and he was overheard . . . . It would be a dubious service to the genuine liberties protected by the Fourth Amendment to make them bedfellows with spurious liberties improvised by farfetched analogies which would liken eavesdropping on a conversation, with the connivance of one of the parties, to an unreasonable search or seizure. We find no violation of the

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[165] *Id.* at 752-53 (citing McDonald v. United States, 335 U.S. 451 (1948); Johnson v. United States, 333 U.S. 10 (1948); Nueslein v. District of Columbia, 115 F.2d 690 (D.C. Cir. 1940)).

[166] *On Lee*, 343 U.S. at 753.

[167] *Id.* at 753.

[168] *Id. But cf.* Maclin, *supra* note 11, at 190-93, 199-200 (providing critique of *On Lee* Court's analysis); Tracey Maclin, *Informants and the Fourth Amendment: A Reconsideration*, 74 Wash. U. L.Q. 573, 598-603 (1996) (hereinafter Maclin, *Informants*) (same).

[169] *On Lee*, 343 U.S. at 753.

> Fourth Amendment here." [citing *On Lee*] We see no indication in *Katz* that the Court meant to disturb that understanding of the Fourth Amendment or to disturb the result reached in the *On Lee* case, nor are we now inclined to overturn this view of the Fourth Amendment.[170]

Justice Harlan responded to this surprising doctrinal development by acknowledging that the *On Lee* opinion did draw "some support from a brief additional assertion that 'eavesdropping . . . with the connivance of one of the parties' raises no Fourth Amendment problem."[171] But Harlan insisted that it would be a "misreading" of *On Lee* to treat this "unelaborated assertion" as "a wholly independent ground for decision."[172] Without offering further arguments, Harlan maintained that, "at the very least, this rationale needs substantial buttressing if it is to persist in our constitutional jurisprudence" after the Court's issuance of the many decisions that collectively cast doubt upon *On Lee*'s older "understanding of the Fourth Amendment."[173] If Harlan had chosen to analyze the *White* plurality's *On Lee* excerpt in its entirety, he could have pointed out that the ambiguity of the passage, from which the plurality quoted only selectively, created some doubt about the plurality's interpretation of its significance.[174]

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[170] United States v. White, 401 U.S. 745, 750 (1971) (plurality opinion) (quoting *On Lee*, 343 U.S. 747, 753-54 (1952)).

[171] *Id.* at 774 (Harlan, J., dissenting).

[172] *Id.*

[173] *Id.* at 774-75 (noting that the *White* plurality opinion did not rest on the discovery of *On Lee*'s independent ground for decision, and instead provided additional reasoning for its holding, thereby "tacitly" recognizing "the analytic inability of this bare hypothesis [about the independent ground] to support a rule of law so profoundly important to the proper administration of justice"). *Cf. id.* at 746-54 (plurality opinion) (revealing that the analysis of *On Lee* constituted six percent of the word count in the plurality opinion, compared to eleven percent used for borrowed ideas from Justice White's *Katz* concurrence, and eighty-three percent for other arguments and observations).

[174] The relevant passage in *On Lee* consisted of a series of comments that explained why the Court rejected the *On Lee* defendant's fifth argument that *Olmstead* should be overruled. First, the Court noted that the *Goldman* defendant had failed to persuade the Court to reconsider *Olmstead*. Second, the Court pointed out that the *On Lee* defendant's attempt to overturn *Olmstead* "would be of no aid [to him] unless he can show that his situation should be treated as wiretapping." Third, the Court opined that the "presence of a radio set is not sufficient to suggest more than the most attenuated analogy to wiretapping." Fourth, the Court explained that judgment by noting that when

Justice Harlan did not modify his thesis concerning the decline of *On Lee*'s authority when confronted with the *White* plurality's challenge to *On Lee*'s formerly exclusive association with *Olmstead*'s "trespass rationale."[175] Presumably he recognized that Fourth Amendment privacy cases had been litigated for years, apparently without anyone noticing *On Lee*'s "independent ground for its decision."[176] Harlan was prepared to attack *On Lee*'s authority on two fronts, by producing evidence of the evisceration of its trespass rationale, and by challenging its governing assumptions and result as inconsistent with the *White* plurality's "understanding of the Fourth Amendment" as revealed in subsequent precedents.[177]

2. Preservation of a Fossilized *On Lee* while Fourth Amendment Evolution Quickened

Harlan's discussion of the three newly emerging Fourth Amendment principles illustrated the ways in which the *On Lee* opinion had acquired two conspicuous flaws as it aged. First, the framework of older principles reflected in *On Lee*'s reasoning had been replaced with opposing principles, so that the *On Lee*

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the agent receiving transmitted conversations overheard the defendant, this event had the same "effect on his privacy" as if the agent "had been eavesdropping outside an open window." Fifth, the Court noted that the equivalence between plain hearing and electronic hearing was analogous to the equivalence between plain sight and the permissible use of "bifocals, field glasses or the telescope." Finally, the Court summed up its conclusion that "eavesdropping," presumably nonelectronic overhearing, should not be likened to other intrusions that constitute a search or seizure. *On Lee*, 343 U.S. at 753-54. *But see id.* at 765, 766-67 (Burton, J., dissenting) (endorsing the opposite logic from Justice Jackson, because even though agents outside the premises may use hearing aids to pick up a conversation inside the premises "more distinctly," this rule should not justify treatment of a transmitting device on wired listener as merely a hearing aid; arguing that a transmitter was equivalent to the physical presence of a listening agent hidden illegally inside the premises). *See also* Geoffrey Stone, *The Scope of the Fourth Amendment: Privacy and the Police Use of Spies, Secret Agents, and Informers*, 1976 AM. B. FOUND. RES. J. 1199, 1222 (viewing Justice Jackson's rejection of the defendant's fourth argument as a response to the dissents by Justices Frankfurter and Douglas in *On Lee*).

[175] *White*, 401 U.S. at 773 (Harlan, J., dissenting).

[176] *Id.* at 750 (plurality opinion).

[177] *Compare White*, 401 U.S. at 750 (plurality opinion) (describing *On Lee*'s "independent ground" as "an understanding of the Fourth Amendment") *with id.* at 769 (Harlan, J., dissenting) (referring to the Court's "perception of the scope and role of the Fourth Amendment since *On Lee* was decided").

Court's holding was both outdated and inconsistent with the framework that now provided the starting point for resolving the *White* issue. Second, *On Lee* had acquired a dossier of critical commentary in Supreme Court dissents and concurrences, and Court majorities had repeatedly refused to apply its holding and rationales as written. This treatment cast upon *On Lee* the status of an unusable precedent, whose citation in subsequent cases became, in Harlan's view, an empty gesture.[178] As a technical matter, *On Lee*'s result remained "on the books" while the pre-*Katz* cases foreshadowed the Court's readiness to extend the implicit rejections of *On Lee*'s premises to the explicit rejection of its result.[179]

The earliest seeds of the three emerging Fourth Amendment principles could be found in the dissenting opinions in *On Lee*, *Goldman*, *Olmstead*, and in other early opinions.[180] When these principles emerged in the Court's majority opinions, they received validation together in the same cases, because each principle complemented and served to support the value of the other principles. For example, the *Silverman* Court emphasized the value of the "core" privacy right to retreat into the home, noted the absence of a technical trespass committed by the government's use of a "spike mike," and observed, "Inherent Fourth Amendment rights are not inevitably measurable in terms of ancient niceties of tort or real property law."[181]

Harlan used both privacy cases and search cases to illustrate the Court's endorsements of the emerging principles, as

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[178] *See, e.g.*, *White*, 401 U.S. at 777, 780 (Harlan, J., dissenting) (referring to citations to *On Lee* in *Lopez* and *Berger*).

[179] *See supra* notes 9 & 39 (revealing how this readiness was erased with the appointment of Justice Blackmun in 1970, who provided the fourth vote for the *White* plurality opinion and the fifth vote for the rejection of protection for the privacy interest).

[180] *See, e.g.*, Goldman v. United States, 316 U.S. 129, 136-41 (1942) (Murphy, J., dissenting) (focusing on the value of a right to privacy, on the arbitrariness of a physical invasion requirement, and on the need to protect revelations of private thoughts expressed in conversations); *id.* at 140 n.8 (noting how *Olmstead* departed from the approach of earlier decisions that "insisted on a liberal construction of the Fourth Amendment" (citing Gouled v. United States, 255 U.S. 298 (1921); Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920); Boyd v. United States, 116 U.S. 616 (1886)).

[181] Silverman v. United States, 365 U.S. 505, 511-12 (1961).

evidenced by his reliance on cases like *Jones v. United States*[182] and *Warden v. Hayden*.[183] The *Jones* Court emphasized that the subtle historical distinctions of private property law should not be imported into the law defining Fourth Amendment rights, and recognized that overnight guests should have standing to challenge dwelling searches.[184] *Hayden* similarly relied on the decades of doctrinal movement away from reliance on common-law property concepts as the governing definitions for privacy interests, and overturned the longstanding prohibition on the seizure of "mere evidence" in which the government could assert no property interest.[185]

The *Lopez*, *Osborn*, and *Berger* decisions provided Harlan with his most direct evidence of the Court's emerging dissatisfaction with *On Lee*'s rejection of the Fourth Amendment's application to the government's use of wired listeners. If the *Lopez* issue had been decided soon after *On Lee*'s ruling in 1952, that ruling should have supplied the controlling authority to uphold the use of a recording device by the government official who entered the *Lopez* defendant's office. According to *On Lee*'s rationales, such an entry would be non-trespassory.[186] But Harlan's *Lopez* opinion in 1963 did not invoke *On Lee* as the controlling authority in this way, and his *White* dissent pointed to the narrowness of his *Lopez* reasoning as an obvious sign of the Court's retreat from both "the questionable rationale" and the result of *On Lee*.[187] Specifically, Harlan's *Lopez* opinion emphasized a government official's use of a recording device could be upheld because it was not a transmission device. The decision further

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[182] Jones v. United States, 362 U.S. 257 (1960).

[183] Warden v. Hayden, 387 U.S. 294 (1967).

[184] *Jones*, 362 U.S. at 266. *But cf.* Rakas v. Illinois, 439 U.S. 128, 143 (1978) (preserving right of overnight guest to challenge dwelling search, but rejecting *Jones* Court's extension of standing to "anyone legitimately on the premises where a search occurs").

[185] *See Hayden*, 387 U.S. at 304-10 (noting early example of the Court's escape from "the bounds of common law property limitations in *Silverthorne*," which recognized the need for a suppression remedy even when "no possible common law claim existed for the return of the copies made by the Government of the papers it had seized"). *See generally* Morgan Cloud, *A Liberal House Divided: How the Warren Court Dismantled the Fourth Amendment*, 3 OHIO ST. J. CRIM. L. 33, 55-61 (2005) (analyzing the abolition of the "mere evidence" rule).

[186] *See supra* Part III.B.1. (discussing *On Lee* rationales).

[187] United States v. White, 401 U.S. 745, 768, 776 (1971) (Harlan, J., dissenting).

distinguished *On Lee* by noting that the invisible government agents in *Lopez* had not committed "electronic eavesdropping" by listening to the defendant's conversations.[188] This refusal to reaffirm the *On Lee* result was all the more remarkable because it was not a necessary consequence of the Court's endorsements of the emerging but more abstract general Fourth Amendment principles. Thus, *Lopez* marked the first clear turning point that foreshadowed the Court's readiness to reopen the *On Lee* decision, at the same time that four members of *Lopez* Court were ready to go further and overrule *On Lee*.[189]

Both *Osborn* and *Berger* spoke directly to the Court's endorsement of the warrant system for the use of listeners with either recorders or wiretaps. In Harlan's view, the *Osborn* Court's approach effectively superceded the authority of *Lopez*, as the *Osborn* opinion "expressly abjured reliance on *Lopez*" and approved of the use of the recording informant based on the judicial approval of that use.[190] The reach of *Berger*'s reasoning went even further and "expunged any remnants of former doctrine" that were inconsistent with the Court's declaration "that, as a general principle, electronic eavesdropping was an invasion of privacy and that the Fourth Amendment prohibited unsupervised 'bugging.'"[191] This principle effectively buried the contradictory perspective of *Olmstead* and *On Lee*. Although *Berger*'s narrow holding addressed the elements required for valid wiretapping warrants, Harlan noted that the "emerging operative assumptions" of *Berger* rested on the commitment to judicial scrutiny of "electronic surveillance" devices generally because their current "indiscriminate use" by law enforcement posed a threat to liberty.[192] As Harlan's assessments of *Lopez*, *Osborn*, and *Berger* made apparent, the question to be addressed in *White* was not whether *Katz* had "disturbed" *On Lee*, but whether *On Lee* had survived the pre-*Katz* privacy and search precedents of the 1960s.[193] Moreover, Harlan found further evidence

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[188] *Id.* at 775.
[189] *Id.* at 776.
[190] *Id.* at 777-78.
[191] *Id.* at 779.
[192] *Id.* at 780, 778 n.12.
[193] *Id.* at 779.

of *On Lee*'s fossilization in the Court's support for judicial scrutiny, illustrated in post-*Katz* search precedents, of government intrusions that had been left unregulated in the *On Lee* era.

3. The Unforeseen New Era of the Primacy of the Warrant Principle

Harlan emphasized the need to consider the primacy of a fourth "general" Fourth Amendment principle in order to appreciate the outdated character of the presumptions underlying the *On Lee* decision.[194] He described this principle as a requirement that, "in order to be constitutionally permissible," any "official investigatory action that impinges on privacy must typically . . . be subjected to the warrant requirement."[195] As evidenced by the *Katz* litigation, the idea that the warrant requirement might be applied feasibly to electronic surveillance was still being "worked out" at the time of the *Osborn* and *Berger* decisions.[196] At the time of the *On Lee* decision, this idea would have been a radical one for the Court to accept because of the existence of several doctrinal obstacles. These obstacles helped to explain why the reasoning of the Court's opinions in *Olmstead*, *Goldman*, and *On Lee* did not discuss the option of requiring a traditional search warrant for the electronic surveillance methods at issue. Instead, the Court appeared to assume in this era that the recognition of a claimed privacy interest would result in the prohibition of the surveillance method.[197]

The first obstacle was the doctrinal prohibition on using search warrants for the seizure of "mere evidence," which was established in *Gouled* and not abandoned until *Hayden*.[198] The seizable categories of evidence included contraband, criminal proceeds, and instrumentalities of crime. The evidence of con-

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[194] *Id.* at 781.

[195] *Id.*

[196] *Id.* at 780.

[197] *Cf.* Sklansky, *supra* note 107, at 234 (noting that a "passing" comment in *Silverman* regarding the possibility of a warrant was a sign of a new era); Goldman v. United States, 316 U.S. 129, 136, 140 n.7 (1942) (Murphy, J., dissenting) (speculating that some type of "administrative supervision" of detectaphone could be established as a substitute for traditional search warrant process).

[198] Warden v. Hayden, 387 U.S. 294, 304-10 (1967).

versations did not fit any of those categories in a literal sense.[199] A second obstacle was the requirement for warrants to describe, with particularity, the things to be seized. Unlike tangible objects, conversations exist in the future, and their content, timing, and parties are not possible to describe with accuracy.[200] In addition, an ordinary search warrant would be disclosed after execution, but disclosure of an ongoing warrant to intercept conversations would put an end to the secrecy of the surveillance.[201] In 1967, after the "mere evidence" rule was abolished in *Hayden*, the *Berger* decision established the template for a warrant system for wiretapping.[202] Shortly thereafter, *Katz* affirmed the feasibility of applying the warrant system to the use of the recording device on the telephone booth.[203]

Thus, one fossilized aspect of the framework for the *On Lee* decision was the "all-or-nothing" framework of options that informed its 1952 holding and rationales, which were embedded in the assumptions of the era of the "mere evidence" rule.[204] *On Lee* arguably could not serve as meaningful authority for the contested issue in *White* concerning the imposition of the warrant requirement on wired listeners. The *On Lee* Court rejected a privacy claim during an era when acceptance of the claim would have required the government to stop using wires, not merely to get warrants for wires. Even before *On Lee*'s trespass rationales eroded, *On Lee* could have been regarded as being inapposite from the start as useful authority for *White*.

Harlan's concern with the "primacy" of the warrant principle was a different one, however, and his evidence for the

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[199] Sklansky, *supra* note 107, at 235.

[200] *See id.* at 236 & n.64 (describing the view that warrants for the interception of conversation would not satisfy the particularity requirement and would constitute unreasonable "general warrants").

[201] *Id.* at 236.

[202] *Hayden*, 387 U.S. at 307.

[203] Katz v. United States, 389 U.S. 347, 354-55 (1967).

[204] *Compare* United States v. Johnson, 333 U.S. 10, 13-14 (1948) (providing Justice Jackson's famous description of the warrant requirement as an essential protection for "a society which chooses to dwell in reasonable security and freedom from surveillance" (quoted in United States v. White, 401 U.S. 745, 768, 781 n.17 (1971) (Harlan, J., dissenting)) *with* On Lee v. United States, 343 U.S. 747, 758 (1952) (revealing no comment by Justice Jackson concerning the feasibility of imposing the warrant system on the use of wired listeners).

emerging primacy of that principle did not stop with *Silverman*, *Osborn*, *Berger*, and *Katz*.[205] He also relied on the search cases of *Camara v. Municipal Court*,[206] *Chimel v. California*,[207] and *Terry v. Ohio*,[208] to show how the justifications for warrants for wired listeners in *White* were supported by the expansion of Fourth Amendment protection in each of these precedents. In *Camara* and *Chimel*, government searches that were previously unregulated by the warrant requirement were brought under its mandate, and for similar reasons. The *Camara* Court required warrants for housing inspections, but demonstrated flexibility by approving a warrant based on area-wide need for inspections, rather than evidence of need for inspecting particular houses.[209] The *Chimel* Court's ruling effectively required search warrants for houses that previously could be searched from top to bottom when an arrest occurred inside.[210] Both precedents recognized that judicial pre-authorization provided desirable protection against arbitrary police intrusions and "hunting expedition[s]" for evidence.[211] These precedents supplied evidence of the Court's support for case-by-case scrutiny of government justifications for privacy intrusions, and *Terry*'s stop-and-frisk rules demonstrated a commitment to that principle, even in the absence of a warrant requirement.[212] As Harlan's analysis intimated, from the perspective of the *On Lee* Court, each of these three decisions would have been inconceivable applications of the warrant principle in 1952, highlighting a further dimension of *On Lee*'s fossilization and providing a further reason to abandon its holding.

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[205] *White*, 401 U.S. at 781 (Harlan, J., dissenting).

[206] 387 U.S. 523 (1967).

[207] 395 U.S. 752 (1969).

[208] 392 U.S. 1 (1968). *Cf. White*, 401 U.S. at 784 (Harlan, J., dissenting) (citing Davis v. Mississippi, 394 U.S. 721 (1969)).

[209] *White*, 401 U.S. at 778, 781-82 (Harlan, J., dissenting).

[210] *See Chimel*, 395 U.S. at 768-69 (overruling United States v. Rabinowitz, 339 U.S. 56 (1950)).

[211] *White*, 401 U.S. at 783.

[212] *See* Catherine Hancock, *State Court Activism and Searches Incident to Arrest*, 68 VA. L. REV. 1085, 1094 (1982) (describing *Terry*'s imitation of the warrant system's protections, in the form of a scope limitation principle that imposed the burden on the government to justify each step in the escalation of an initial intrusion on a case-by-case basis).

C. Harlan's Formulations of the "Should" Question About Risks and Expectations

1. The Task of the Law: To Form and Project the Future, to Mirror and Reflect the Past

The decision to impose the warrant system for the use of wired listeners would have been consistent with virtually every result and rationale of all the precedents that Harlan so painstakingly marshaled, examined, explained, and interpreted in the light of their subsequent treatment in later precedent. But Harlan preferred to speak as though in a dialogue with the *White* plurality, and to begin by offering this sentiment as their own: "That the foundations of *On Lee* have been destroyed does not, of course, mean that its result can no longer stand."[213] Then he responded by offering his reasons that the *On Lee* result "should not stand," because of the lack of "substantial buttressing" needed for it "to persist in our constitutional jurisprudence."[214]

Harlan continued the dialogue by noting the narrowness of the precedents of *Hoffa*, *Lewis*, and *Lopez*, which the plurality had "fasten[ed] upon" to "resist the undercurrents of the more recent cases" that imposed the warrant requirement on forms of electronic surveillance as well as other intrusions.[215] None of the plurality's three precedents involved the "surreptitious third ear" of the government agent who receives a transmission from the wired listener.[216] For that reason, Harlan concluded that the plurality's effort to "buttress" *On Lee* could be reduced to a single argument based on two assumptions. Implicitly, the *White* plurality first assumed that "the distinction between third-party monitoring and *other* undercover techniques" is "one of form and not substance."[217] Accordingly, the plurality then assumed that

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[213] *White*, 401 U.S. at 784.
[214] *Id.* at 775.
[215] *Id.* at 784.
[216] *Id.*
[217] *Id.* at 785.

the electronic monitoring in *White* involved the same invasion of privacy as other uses of unwired listeners.[218]

Harlan recognized that the plurality opinion used the *Katz* vocabulary of "expectations" interchangeably with the vocabulary of "risks," plugging these words into similar comments about the risks undertaken by "wrongdoers" and about their "expectations."[219] For example, the *White* plurality declared that since a wrongdoer "necessarily risks" the "trustworthiness" of any confidante who may be an informant, it may be concluded that neither a wired nor unwired informant will invade the wrongdoer's "justifiable expectations of privacy."[220] Justice White passed quickly over the question whether "defendants" have actual (subjective) expectations of privacy, because that was not the Court's "problem."[221] Instead, as he explained, "Our problem, in terms of the principles announced in Katz, is what expectations of privacy are constitutionally 'justifiable.'"[222] Asked another way, "[W]hat expectations [will] the Fourth Amendment . . . protect in the absence of a warrant"?[223] For Justice White, the answer was provided by logic: "[T]he law permits the frustration of actual expectations" by the use of non-electronic reporting informants in *Hoffa* and *Lewis*, and so the same "frustration of expectations" must be justifiable under the law for those monitored by wired informants.[224]

Rather than criticize Justice White directly for resting the plurality's decision on these assumptions, Harlan observed neutrally that "the 'so-called risk analysis' approach of *Lewis*" and *Hoffa*, and the "expectations approach" of *Katz*, "have their limitations and can ultimately lead to the substitution of words for analysis."[225] Harlan then seized the gift that the plurality's reasoning provided for him—the opportunity to call attention to the

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[218] *Id.*
[219] *Id.* at 789.
[220] *Id.* at 751-52 (plurality opinion).
[221] *Id.* at 751.
[222] *Id.* at 752.
[223] *Id.*
[224] *Id.*
[225] *Id.* at 786 (Harlan, J., dissenting) (noting that the "risk" and "expectations" approaches are formulations that "represent an advance over the unsophisticated trespass analysis of the common law").

responsibility of judges for articulating and explaining the potential meanings of "expectations" and "risks." Harlan explained that the analysis of "expectations" or "risks" always raised a "should" question, concerning "the desirability" of recognizing particular expectations, or conversely, of "saddling" particular risks "upon society."[226] Harlan did not want judges to "merely recite the expectations and risks" that only reflect the "laws that translate" customs and values into rules.[227] He declared that "the task of the law" is to "form and project" the customs and values of the future, as well as to "mirror and reflect" the "customs and values of the past and present."[228]

In speaking of the recitation of risks, Harlan might have been referring to the unhelpful legacies of *Olmstead*, *Goldman*, and *On Lee*, whose rationales directed judges to the past, rather than enabling them to build Fourth Amendment foundations for the future of the electronic age. Harlan's talk of the competing tasks of the law, to be focused on the future as well as on the past, reflected his understanding of the historically contested character of the judicial portrayal of the customs and values at stake in electronic surveillance controversies. For judges who asked the "should" question, Harlan's analysis of the privacy precedents revealed that the Court's holdings had not remained static, and implied the they would change in the future.[229] The *White* plurality's attempt to resurrect *On Lee* symbolized a philosophy that was the opposite of Harlan's perspective. He wanted judges to avoid the recitation of past conclusions con-

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[226] *Id.*

[227] *Id. Cf.* Dolores A. Donovan, *Informers Revisited: Government Surveillance of Domestic Political Organizations and the Fourth and First Amendments*, 33 BUFF. L. REV. 333, 363 & n.145 (1984) (recognizing that Harlan's approach to determining expectations of privacy is "prospective in nature," asking whether, "under our system of [representative democracy]," it will be "desirable to live in a society in which the expectations of privacy in question are not protected . . . against unreviewable governmental action") (referring to *White*, 401 U.S. at 786 (Harlan, J., dissenting)).

[228] *White*, 401 U.S. at 786 (opining that Fourth Amendment analysis must "transcend the search for subjective expectations or legal attribution of assumptions of risk"). *See* Jonathan Simon, *Katz at Forty: A Sociological Jurisprudence Whose Time Has Come*, 41 U.C. DAVIS L. REV. 935, 959 (2008) (recognizing Harlan's concern with the jurisprudence of "the social" in his search for "transcendence" analysis).

[229] *See supra* text accompanying notes 40, 180 (noting dissents in *Olmstead*, *Goldman*, *On Lee*, and *Lopez*).

cerning expectations and risks by remembering the need to open the intellectual doors to re-examining those conclusions. In Harlan's hands, the implementation of the "task of the law" called for the independent scrutiny of each new privacy problem, not for reliance on analogies to outdated privacy doctrines.

2. Harlan's Standard: Assessing the Impact of Surveillance on the Ordinary Citizen

In addressing the "should" question about the risks and expectations involved in *White*, Harlan explained that "[t]his question must . . . be answered by assessing the nature of a particular practice and the likely extent of its impact on the individual's sense of security," since that sense "is the paramount concern of Fourth Amendment liberties."[230] Here the "individual" represented everyone, including the "public generally," and more particularly, the "ordinary citizen" who "has never engaged in illegal conduct in his life."[231] Harlan assumed that government officials possess neither the foresight nor the good fortune to commence investigations only against individuals who may be convicted of crimes, or "wrongdoers" who may be "contemplating illegal activities."[232] Therefore, the agents who manage informants and equip them with wires cannot be expected to avoid the monitoring of "ordinary citizens."

Harlan could not imagine why courts should assume that the presence of wired informants and agents in our midst would have no impact on our lives. He saw that impact as the Fourth Amendment's concern, because it impairs "that confidence and sense of security in dealing with one another that is characteristic of individual relationships between citizens in a free society."[233] Given the function of the warrant system as the constitutional method of providing judicial protection to that sense of security, Harlan articulated the "should" question in *White* as follows: "[W]hether, under our system of government, as reflect-

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[230] *White*, 401 U.S. at 786 (Harlan, J., dissenting).

[231] *Id.* at 789- 90.

[232] *Id.* at 749-53 (plurality opinion) (repeating references to "wrongdoers" or "defendants").

[233] *Id.* at 787 (Harlan, J., dissenting).

ed in the Constitution, we should impose on our citizens the risks of the electronic listener or observer without at least the protection of a warrant requirement."[234]

Although Justice White did not formulate a "should" question in the plurality opinion, a suitable question to fit that opinion could have been phrased as follows: Whether we should impose on "wrongdoer[s]" or on those "contemplating illegal activities" the risk of the electronic listener, on the grounds that this risk is similar to that already imposed by the Court's precedents on such persons, namely the risk that the listener will report back to government officials without the aid of electronic surveillance.[235] A further refinement of that question could be accomplished by adding this question: Whether we should deem these two risks to be similar in the absence of "persuasive evidence" produced by the defendant that the utterances of "wrongdoers" would be "substantially different" or their sense of security any less if they thought it possible that the listener might be wired with an electronic surveillance device.[236]

A comparison of Harlan's question with these questions illustrates how the scope of the plurality's inquiries differed in several ways. First, the plurality justices saw no reason to conduct an "impact analysis" concerning the potential effects of surveillance by wired agents and informants on ordinary citizens. Second, they viewed the government's power to use surveillance tools, without judicial scrutiny, as a need that should be accommodated when the "risks" to "wrongdoers" could be viewed as sufficiently similar.[237] Third, they placed the burden of disproving the similarity of these risks on the defendant in

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[234] *Id.* at 786.

[235] *Id.* at 751-52 (plurality opinion) (repeating analogies between disclosures by trusted accomplices under all surveillance circumstances).

[236] *Id.* at 752-53 (declaring that "there is no persuasive evidence" that this difference "is substantial enough to require discrete constitutional recognition"). *But cf.* Sherry F. Colb, *What Is a Search? Two Conceptual Flaws in Fourth Amendment Doctrine and Some Hints of a Remedy*, 55 STAN. L. REV. 119, 159 (2002) (noting that the *White* plurality equated first treated "a willingness to trust people" as "an invitation to deception" by disclosing informants, and second, treated "the further sharing of the [electronic] fruits of that pretense" with government agents as "no more intrusive than the initial deception").

[237] *Id.* at 752-53 (plurality opinion). *Cf.* Brief for the United States, *supra* note 7, at 33 (describing the government's "right" to use a listening device on an informant).

White. Finally, they defined the burden implicitly to require the production of empirical evidence that would be difficult, if not impossible, to produce.[238]

These questions of the *White* plurality justices produced a simple inquiry because so many other questions were avoided. The questions were designed to be answered, "No." In the absence of the aforementioned evidence, the risks of disclosure from reporting and from electronic surveillance were deemed to be similar for wrongdoers. A third and final question of the plurality could be phrased as follows: Whether any evidentiary barrier should be erected to the admission of transmitted conversations obtained by wired listeners, given the "accurate," "reliable," "relevant," and "probative" nature of such evidence.[239] Again, the answer would be, "No." The plurality described the defendant's claim for recognition of a privacy interest as a demand for "a Fourth Amendment privilege" against the admission in evidence of "a more accurate version" of a conversation than could be obtained from an unwired informant.[240]

Justice Harlan's dissent posed questions that held no interest for the plurality. First, in undertaking an inquiry into the "impact of the practice of third-party bugging," Harlan observed that the impact of wired agents and informants constituted an "extensive" type of intrusion that would "significantly jeopardize" the sense of security of citizens in a free society.[241] Second, Harlan made it clear that his inquiry required the exercise of

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[238] *White*, 401 U.S. at 752 (plurality opinion) (observing that "it is only speculation to assert that the defendant's utterances would be substantially different or his sense of security any less if he also thought it possible that the suspected colleague is wired for sound").

[239] *Id.* at 753. *Cf.* Orin S. Kerr, *The Case for the Third-Party Doctrine*, 107 MICH. L. REV. 561, 575-77 (2007) (arguing in favor of *White* rule and similar rules). *But cf.* Andrew E. Taslitz, *The Fourth Amendment in the Twenty-First Century: Technology, Privacy, and Human Emotions*, 65 LAW & CONTEMP. PROBS. 125, 137 (2002) (observing that the *White* plurality's consideration of the state's need for the evidence supplied by wired listeners would have been more appropriately addressed "under the [Fourth] Amendment's [reasonableness analysis] balancing rubric," rather than being used to determine whether to recognize the privacy interest).

[240] *White*, 401 U.S. at 753. *See infra* text accompanying note 283.

[241] *Id.* at 786-87 (Harlan, J., dissenting). *Cf.* Stone, *supra* note 174, at 1219 (describing the importance of assessing the impact of a surveillance practice "on the lives of individuals and on the nature of society").

imagination as to the possible impact arising from unregulated "bugging." He was concerned about the future possible impact that might be imagined if the uses of such surveillance were to become a "prevalent practice."[242] Third, he did not demand empirical proof of present impact, although he might have regarded such evidence as helpful. Instead, he was prepared to take judicial notice of the potential impact of wired listeners and observers, in formulating a basis for discerning cultural intuitions about the nature of that impact.[243] In Harlan's view, "[a]uthority is hardly required to support the proposition that words would be measured a good deal more carefully and communication inhibited if one suspected his conversations were being transmitted and transcribed."[244] Harlan went on to describe how the impact of wired listeners would be both personal and political, with the potential to inhibit "much vital social exchange,"[245] and to "smother that spontaneity—reflected in frivolous, impetuous, sacrilegious, and defiant discourse—that liberates daily life."[246]

Harlan was attuned to the potential consequences of the government's gathering of "speech" evidence, and to the impossibility of separating the sense of security about freedom of speech as a daily and lived expectation, from the sense of security about the surreptitious discussion of criminal activities. He was the Court's architect of the doctrines that led to enduring restrictions of the government's power to prosecute the advocacy

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[242] *Id.* at 787 (Harlan, J., dissenting).

[243] When Harlan called for "assessing the nature of a particular practice and the likely extent of its impact on the individual's sense of security," he ended this statement with "balanced against the utility of the conduct as a technique of law enforcement." *Id.* at 786. However, he did not engage in such "balancing" in *White* or even identify specific aspects of the "utility" of the conduct. Given the difficulty of comparing incommensurable values such as impact and utility, scholars have criticized the latter element without mentioning that Harlan never described or applied it in his *White* dissent. *See, e.g.*, William C. Heffernan, *Fourth Amendment Privacy Interests*, 92 J. CRIM. L. & CRIMINOLOGY 1, 44 n.161 (2001/2002).

[244] *White*, 401 U.S. at 787 (Harlan, J., dissenting).

[245] *Id.* at 788 n.23.

[246] *Id.* at 787. *See also* Doernberg, *supra* note 41, at 284-85 (criticizing the *White* plurality's demand for empirical proof of inhibiting effect of wired listeners, and observing that evidence rules provide for privileges based on the presumption that requiring disclosures would have inhibiting effects on a variety of behaviors).

of illegal action.[247] Moreover, only two months after the *White* decision, Harlan authored the Court's opinion in *Cohen v. California*,[248] and his advocacy of Fourth Amendment protection in *White* for "frivolous, impetuous, sacrilegious and defiant discourse" echoed his reasoning in support of First Amendment protection for the vulgar, the profane, and the immoral speech that cannot be punished without the danger of thought control.[249]

In his impact analysis, Harlan treated the government's practice of "third party bugging" as tantamount to a form of overbroad speech regulation. Members of society would have reason to fear potential future intrusions and exposures, and would remain vulnerable to exposure of past intrusions. Such records might appear at any time and embarrass, stigmatize, or damage a person, with or without provoking potential criminal prosecution.[250] Each type of fear could produce a chilling effect on speech.

The first sense of fear invoked by Harlan was that which comes from the envisioned "instantaneous intrusion" of the invisible third ear, the government agent who receives the trans-

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[247] *See* Yates v. United States, 354 U.S. 298 (1957); Scales v. United States, 367 U.S. 203 (1961); Noto v. United States, 367 U.S. 203 (1961). *Cf.* YARBROUGH, *supra* note 4, at 190-197 (reviewing these Harlan opinions for the Court, which led the government to abandon Smith Act prosecutions).

[248] 403 U.S. 15 (1971) (enlarging First Amendment protection for offensive speech by reversing a disorderly conduct conviction for wearing a jacket displaying expletive in message). *Cf.* Street v. New York, 394 U.S. 576 (1969); Thomas B. Stoel, Jr., *in* REMEMBRANCES, *supra* note 15, at 165 (noting that Harlan's original majority draft in *Street* concluded that the First Amendment protected flag burning, but when the majority "melted away, and it looked as though the Court would hold that flag burning wasn't constitutionally protected," Harlan revised his opinion to reverse the conviction on narrower grounds and held on to the majority).

[249] *Cf.* Dorsen, *supra* note 5, at 1419-20 (quoting *Cohen*'s principles and noting their importance for First Amendment doctrine); Taslitz, *supra* note 239, at 136-37 (noting that the *White* plurality ignored "[t]he broader impact of its rule on political dissenters, . . . unpopular minority groups, and the wider citizenry"); Karen A. Springer, *In God We Trust; All Others Who Enter This Store Are Subject to Surveillance*, 48 FED. COMM. L.J. 187, 203 (1995) (observing that Harlan's *White* dissent sought to protect the discourse of "informal conversation between intimates" which contains "agreeable falsehoods, exaggerations, obscenities, and even antisocial views that the speaker does not expect to be taken seriously").

[250] Springer, *supra* note 249, at 203 (recognizing that disclosure of conversations may "lead to adverse consequences such as the loss of respect, or a job, or friends").

mitted conversations from the wired listener and who thereby becomes empowered to engage in "prying" into the speaker's "private affairs."[251] The second sense of fear was that which comes from the agent's power to preserve those conversations with a recording that "insures full and accurate disclosure of all that is said, free of the possibility of error and oversight."[252] This fear may be heightened by the realization that it is easy for the recording agents or anyone else who becomes privy to the recording to interpret speech in damaging ways. Disclosures could lead to the loss of relationships, of jobs, and of reputation, even when no criminal activity might be disclosed. That second sense of fear, as Harlan portrayed it, would be fueled by the realization that a person's recorded speech may carry erroneous connotations "when instantaneously heard by others unknown to him and unfamiliar with his situation or analyzed in a cold, formal record played days, months, or years after the conversation."[253]

Harlan objected to the implicit "should" questions posed by the *White* plurality justices, because they failed to consider the impact of wired listeners on ordinary citizens. He also objected to their failure to recognize that the consequence of Fourth Amendment protection from wired listeners would be the interposition of the warrant system upon government officials seeking to use wires, not the prohibition of this surveillance technique.[254] Together, these two failures prevented the plurality from recognizing that the warrant requirement was all about "risks" because, in Harlan's view, its "very purpose" was to "redistribute the privacy risks throughout society in a way that produce[d] the results the plurality opinion ascribe[d] to the *On Lee* rule."[255] That is, assuming that the plurality's goal was to impose the risk of transmission by informants upon "wrongdoers," the warrant requirement would achieve this result by approving of the use of wired listeners upon this class of non-

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[251] *White*, 401 U.S. at 789 (Harlan, J., dissenting).

[252] *Id.* at 787.

[253] *Id.* at 790. *Cf.* Taslitz, *supra* note 239, at 138 (observing that "the gravest danger is that of having one's character misjudged by being taken out of context").

[254] *White*, 401 U.S. at 789-90 (Harlan, J., dissenting).

[255] *Id.* at 789.

ordinary citizens, who could be identified by probable cause evidence of their criminal activities.

Harlan's focus on the warrant requirement provided a reminder that the *White* plurality's analysis of the benefits of wired listeners never explained how the scope of such benefits would be weakened by the probable cause and warrant requirements. The plurality also failed to explain its deference to the government need for the benefits of unregulated wired listeners. This need was presumed to be so strong that it could not be satisfied with the benefits from warrant-authorized wired listeners. That presumption effectively trumped the primacy of the Fourth Amendment warrant principle. The *White* plurality did not address the possibility that government agents would fail to exercise what Harlan called "self-restraint," by engaging in the use of wired listeners in cases in which no suspicion of criminal conduct existed to justify the investigation of their targets.[256]

For Harlan, the plurality's unstated presumption struck at the core of the Fourth Amendment's protection for "the openness which is at the core of our traditions," provided by placing limitations "on the means and circumstances by which the Government may collect information about its citizens by intruding into their personal lives."[257] Harlan saw that the *White* plurality's holding, writ large, was based on the assumption that "uncontrolled" electronic surveillance "is a tolerable technique of law enforcement, given the values and goals of our political system."[258] For Harlan, this assumption begged the question: Who should bear "the burden of guarding privacy in a free society"—the Government or its citizens? Ulitmately, he saw the Fourth Amendment as standing for the proposition that "the Government . . . must justify its need to electronically eavesdrop."[259]

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[256] *Id. Cf.* Maclin, *Informants*, *supra* note 168, at 625 (noting that the *White* plurality "never addressed the reality that secret police informants would target, just as wiretapping had targeted, the privacy and security of all citizens, the guilty and innocent alike").

[257] *White*, 401 U.S. at 792 (Harlan, J., dissenting).

[258] *Id.* at 785.

[259] *Id.* at 793.

III. REFLECTIONS ON HARLAN'S UNDERSTANDINGS OF FOURTH AMENDMENT PRIVACY AS FREEDOM

A. Harlan's Views After Katz *and Before* White *About Expectations of Privacy*

It is ironic that a justice like Harlan, with his commitment to careful articulation of the reasoning for his decisions through the synthesis of nuanced interpretations of vast quantities of judicial prose, would receive not only Fourth Amendment fame but also intense scrutiny and criticism of his ideas, based on the twenty-seven words in his *Katz* concurrence about "expectations of privacy."[260] Harlan's dissent in *White*, with its cautionary observation that "the expectations approach" can "lead to the substitution of words for analysis,"[261] has been interpreted as an expression of his "second thoughts" about his quotable and iconic formula in *Katz*.[262] The truth appears to be more complicated, and it is useful to consider how Harlan interpreted the expectations concept in his opinions appearing after *Katz* and before *White*.

In his opinion in *Alderman v. United States*,[263] Justice Harlan interpreted the *Katz* rationale as providing Fourth Amendment "right to conversational privacy"[264] for "every person who participates in a conversation he legitimately expects will remain private,"[265] and for every person who "is not actually speaking" but "is listening to the confidences of others."[266] To

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[260] *See, e.g.*, *Simon*, *supra* note 228, at 947-49, 952-54; CLANCY, *supra* note 107, at 68 & n.139 (citing examples of criticism of the Court's use of the "expectations" formula). *Cf.* Doernberg, *supra* note 41, at 268 n.83 (citing thirty-five cases during the thirty-eight years since the *Katz* decision in which the Court has attempted "to deal with" the expectations standard).

[261] *White*, 401 U.S. at 786 (Harlan, J., dissenting).

[262] *See, e.g.*, Heffernan, *supra* note 243, at 44 n.161 (observing that Harlan's *White* dissent shows that he came to have doubts about the expectations test); Stone, *supra* note 174, at 1213 n.70 (describing Harlan as having "second thoughts" in *White* about the expectations test); Amsterdam, *supra* note 15, 384 & n.345 (same).

[263] Alderman v. United States, 394 U.S. 165, 187 (1969) (Harlan, J., concurring in part and dissenting in part).

[264] *Id.* at 194.

[265] *Id.* at 191.

[266] *Id.* at 191 n.4.

these individuals, Harlan would have granted standing to object to the admissibility of electronically-seized conversations. He was willing also to consider an extension of standing "to protect a person's interest in his family's privacy . . . whenever a family member's reasonable expectation of privacy has been infringed," and "regardless of the place where his privacy was invaded."[267] In "the field of conversational privacy," these conclusions illustrated the meaning of the *Katz* adage that "the Fourth Amendment protects persons not places."[268] But Harlan was unwilling to preserve the pre-*Katz* rule that granted standing to a property owner to object to the admissibility of all conversations occurring on the owner's premises, irrespective of whether the owner participated in the conversations or was present at the time they were intercepted.[269] Harlan argued that this pre-*Katz* rule mistakenly treated "the right to conversational privacy"[270] as a property right, and thereby gave *Olmstead* "new life in the law of standing."[271]

Thus, Harlan used the expectations concept in *Alderman* to explain why the personal and direct experience of the disturbance of conversational privacy should define the scope of the right to such privacy. He refused to equate the relationship between a property owner and a dwelling with the protected relationship between a speaker or listener and the speaker's intangible conversation. Harlan acknowledged the longstanding right of an absent property owner to challenge an illegal dwelling entry, and to object to the admission of the tangible effects seized as fruits from that dwelling.[272] But he rejected the right of a property owner to object to an illegal dwelling entry that produced only the "fruits" of intercepted, intangible conversations of people to whom the property owner had no family-based rela-

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[267] *Id.* at 194 (noting that this question need not be reached on the facts of *Alderman*).

[268] *Id.* at 193.

[269] *Id.* at 190-93. *Cf. id.* at 176 (majority opinion) (noting that the government conceded the continuing validity of the rule after *Katz*).

[270] *Id.* at 194 (Harlan, J., concurring in part and dissenting in part).

[271] *Id.* at 191. *Cf. id.* at 178 (majority opinion).

[272] *Id.* at 189-91 (Harlan, J., concurring in part and dissenting in part).

tionship.[273] Justice White's opinion for the *Alderman* Court concluded that nothing in *Katz* "was intended to withdraw any of the protection . . . extend[ed] to the home" in prior precedents.[274] Therefore, the standing right of the property owner must be maintained based on *Silverman*'s holding, which "vindicated . . . the right to be secure in one's own home" at a time when "no right of conversational privacy had been recognized as such."[275] But for Justice Harlan, expectations of privacy in the conversations of others could not be justified by reference to space alone.

The privacy problem in *Mancusi v. DeForte*[276] presented Justice Harlan, speaking for the Court, with the opportunity to consider the role of the expectations concept in a context that did not involve the right of conversational privacy. After state officials entered a union office and seized the union's papers from the custody and over the protest of DeForte, a union official, the union did not protest the seizure. Instead, it was DeForte who was prosecuted and sought to obtain standing to object to the admission of the papers at his trial.[277] As Harlan explained, DeForte had "little expectation of absolute privacy" in the papers,[278] which were taken from him in a large room that he shared with several other union officials, and in which he spent "a considerable amount of time."[279] The record did not reveal the precise location of the papers in the room at the time of seizure, and Harlan noted that if DeForte "had occupied a 'private' office," the Court's precedents would have established his standing to object to the seizure of papers from his desk or filing cabinet in that office.[280] The reasonable expectations of an employee in a private office setting provided Harlan with the start-

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[273] *Id.* at 189-94.

[274] *Id.* at 180 (majority opinion).

[275] *Id.* at 178.

[276] 392 U.S. 364 (1968). *Cf.* Simmons v. United States, 390 U.S. 377 (1968) (holding in another Harlan opinion, not involving discussion of expectations of privacy, that defendant's testimony offered to prove standing to seek suppression of evidence should be inadmissible in order to avoid deterring individuals from asserting Fourth Amendment rights).

[277] *Mancusi*, 392 U.S. at 365.

[278] *Id.* at 370.

[279] *Id.* at 368-69 (citation omitted).

[280] *Id.* at 369 (citations omitted).

ing point for determining the analogous expectations of an employee like DeForte in a shared office space.

Drawing implicitly upon the social norms of courtesy and business practice, Harlan determined that workers in a private office or a shared office would be similarly situated in terms of expectations. They would not be "disturbed" by anyone other than co-workers or their "personal or business guests," and no papers in the offices would be touched "except with their permission or that of union higher-ups."[281] Both of these expectations would be "defeated" by the warrantless entry of the state officials into DeForte's work space and their seizure of the papers, and therefore DeForte should have standing to challenge this violation of his Fourth Amendment right.[282] Harlan saw no need to inquire into the question whether DeForte possessed a legal right to exclude members of the public from the shared office. In this way, the *Mancusi* decision resembled *Katz*, where the Court ignored the government's argument that Katz could have no privacy interest in a telephone booth without a legal right to stop anyone from entering it.[283] Nor did the *Mancusi* Court pause to consider whether the risk of the seizure of the papers by the state officials might have been assumed by DeForte, given the potential exposure of the union's papers to other co-workers or non-invitees.[284] Instead, Justice Harlan's opinion treated an employee's lack of "absolute privacy" as irrelevant, reflecting the assumption that Justice Marshall would later articulate, that "[p]rivacy is not a discrete commodity, possessed absolutely or not at all."[285]

Justice Harlan's *Mancusi* opinion reflected the merger of the "constitutionally protected area" concept with the "expectations of privacy" idea to raise the question whether the shared

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[281] *Id.*

[282] *Id.*

[283] *See supra* note 136 and accompanying text.

[284] *Cf.* California v. Greenwood, 486 U.S. 35, 40 (1988) (rejecting privacy interest in garbage bag left for pickup outside dwelling because of possibility of access of public, including snoops and scavengers, and because of "conveyance" to third-party garbage collector).

[285] Smith v. Maryland, 442 U.S. 735, 748, 749 (1979) (Marshall, J., dissenting). *See* Doernberg, *supra* note 41, at 299 (noting that Harlan's *Mancusi* opinion recognized "relative privacy" in the shared workplace).

office was an area "in which there was a reasonable expectation of freedom from governmental intrusion."[286] Harlan also merged this concept and this idea in his *Katz* concurrence, which included the reference to temporarily private places in which people may have momentary "expectations of freedom from intrusion."[287] He used an analogy in *Mancusi* between workers with private offices and those with shared workspaces, like his analogy between the taxi cab and the telephone booth in *Katz*, in order to anchor the newly recognized privacy interest to the seabed of precedent. However, Harlan's analysis of the nature of the office "area" in *Mancusi* was more complex than the comments in his *Katz* opinion about the fleeting experience of making a call from a telephone booth.[288] For example, his validation of equal expectations of privacy for workers who must share a single room, as well as the furniture and equipment inside it, ran counter to the typical "distributive tilt" of workplace privacy, expressed in the dichotomy between the warrant system protection for "private offices" and the power of police officers to search other types of offices with the consent of an employer.[289]

Moreover, Harlan's assessment of workplace expectations included subtle references to the emotional character of the privacy protection that a warrant would afford the workers in shared offices whose standing received recognition in *Mancusi*. The invisible recording surveillance in *Katz* went unnoticed by the defendant, and his protected expectation concerned his freedom from later discovery of the hidden intrusion and its consequences. But as Harlan noted, the intrusion in *Mancusi* coincided with the immediate workplace experience of being "dis-

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[286] *Mancusi*, 392 U.S. at 368.

[287] Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan, J., concurring).

[288] *Id.* (quoting from the *Katz* majority opinion concerning the behavior and assumptions of a person using a telephone booth).

[289] William J. Stuntz, *The Distribution of Fourth Amendment Privacy*, 67 GEO. WASH. L. REV. 1265, 1270-71 (1999) (explaining the "distributive tilt" and noting that when people share their workspaces, police may look in spaces to which the public has access, and may look in other non-public spaces only with the consent of the employer). *Cf.* CLANCY, *supra* note 107, at 86-87 (describing Harlan's *Mancusi* opinion as "one of the most expansive readings of the scope of a person's right to privacy" and explaining how later cases reflect a more limited view of workplace privacy, such as O'Connor v. Ortega, 480 U.S. 709 (1987)).

turbed" in an enclave where only co-workers abided, by the entry of unauthorized persons demanding possession of documents whose relinquishment could cause negative consequences for the workers.[290] By contrast, Justice Black's dissent in *Mancusi* argued that such experiences could create "no personal injury" or "invasion of the 'personal privacy' or security" of workers, whose status as mere "agents" of the entity gave them no cognizable Fourth Amendment expectations of any kind.[291] Justice White's dissent observed that even if the Fourth Amendment "perhaps" might protect an individual's private desk in an office space shared with others, the Court should not extend the protected area "to the office door."[292]

For similar reasons, Justice Harlan disagreed with the *Mancusi* dissents, the *Alderman* Court, and the *White* plurality. These opinions reflected the view that the *Katz* expectations concept was a vessel that could be filled with arguments that defined privacy based on artificial criteria resembling the legal fictions of the *Olmstead* regime. Harlan favored the development of the expectations concept through use of analogies to prior opinions that attempted to construct more meaningful criteria for the evaluation and recognition of privacy interests. In the years following the *White* decision, Harlan's voice was replaced with those of other justices. As the privacy debates continued, Court majorities often reached decisions that rejected privacy claims and ignored the path of analysis that Harlan proposed in *White*.

B. The Free Society and the Return of Olmstead

When Harlan declared in his *White* dissent that the task of the law is to "form and project" the values and customs of the future,[293] his words sounded the theme of the Brandeis dissent in *Olmstead*, that "[i]n the application of a Constitution, our contemplation cannot be only of what has been, but of what may

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[290] *Mancusi*, 392 U.S. at 369.
[291] *Id.* at 373-74 (Black, J., dissenting).
[292] *Id.* at 377 (White, J., dissenting).
[293] United States v. White, 401 U.S. 745, 786 (1971) (Harlan, J., dissenting).

be."[294] Harlan described *Berger* as "following a path opened by Mr. Justice Brandeis's dissent in *Olmstead*," which was "smoothed" in the pre-*Katz* cases,[295] and led to the Court's conclusion that modern electronic devices must be regulated because they "are capable of eavesdropping on anyone in most any given situation."[296] In Harlan's view, *Berger* brought to life the legacy of Brandeis's arguments, in leaving "no doubt that, as a general principle, electronic eavesdropping was an invasion of privacy and that the Fourth Amendment prohibited unsupervised 'bugging.'"[297] Harlan also quoted from *Boyd v. United States*,[298] first, concerning the need to prevent unconstitutional practices from obtaining "their first footing . . . by silent approaches and slight deviations from legal modes of procedure,"[299] and later, concerning the need to protect "liberty and security" from "all invasions . . . of the sanctity of . . . home and the privacies of life."[300]

Harlan's *White* dissent supplied the foundation that was missing from *Katz*. Four years earlier, "Stewart's opinion for the Court in *Katz* was . . . notable for what it did not say," for relying neither "on *Boyd* [n]or on Brandeis'[s] dissent in *Olmstead*," and for offering "no broad philosophical basis for its decision."[301] Perhaps these gaps in *Katz* explain why Justice Harlan's twenty-seven words from *Katz* "endured,"[302] and why his *White* dissent continues to attract the endorsement of state court judges through incorporation into state constitutional doctrine.[303] Harlan's dissent expressed concern for the protection of

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[294] Olmstead v. United States, 277 U.S. 438, 474 (1928) (Brandeis, J., dissenting) (internal quotations omitted).

[295] *White*, 401 U.S. at 779.

[296] Berger v. New York, 388 U.S. 41, 47 (1967); *see White*, 401 U.S. at 779 (Harlan, J., dissenting).

[297] *White*, 401 U.S. at 779.

[298] 116 U.S. 616 (1886).

[299] *White*, 401 U.S. at 789 (quoting *Boyd*, 116 U.S. at 635).

[300] *Id.* at 793 (quoting *Boyd*, 116 U.S. at 630).

[301] CLANCY, *supra* note 107, at 58.

[302] *Id.* at 60.

[303] *See, e.g.*, State v. Goetz, 191 P.3d 489 (Mont. 2008); State v. Mullens, 650 S.E.2d 169 (W. Va. 2007); State v. Geraw, 795 A.2d 1219 (Vt. 2002); Commonwealth v. Brion, 652 A.2d 287 (Pa. 1995); Commonwealth v. Blood, 507 N.E.2d 1029 (Mass. 1987); Melanie L. Black Dubis, *The Consensual Electronic Surveillance Experiment: State Courts*

the "sense of security . . . that is characteristic of individual relationships between citizens in a free society."[304] This concern inspires the views of scholars who advocate that unregulated surveillance should not diminish the amount of privacy and freedom "'to a compass inconsistent with the aims of a free and open society.'"[305] Justice Harlan's foresight concerning the dangers of unregulated government surveillance was invoked in discussions of the secret presidential order of 2002 to authorize "domestic spying" on citizens.[306] Yet Harlan's dissent did not sway the Supreme Court majority that later endorsed the *White* plurality's position,[307] and the *White* decision had profound effects on the Court's privacy analysis during subsequent decades, wrapped in the rhetoric of Harlan's twenty-seven words about "reasonable" expectations.

Based on Justice White's premise in *White* that *Katz* left *On Lee* undisturbed, the *White* decision might be viewed as carving out a niche for informant cases, so that the rationales of *Hoffa*, *On Lee*, and *White* would continue to remain undisturbed by whatever *Katz* might mean.[308] But this interpretation would not take account of how *Katz*'s right of conversational privacy was disturbed by *White*. Although the *Katz* Court protected a person's conversations from warrantless surveillance by devices attached to objects like telephone booths, the *White* plurality did not protect conversations from such surveillance by devices attached to people. Implicitly, the *White* plurality charged everyone "with the knowledge that when they speak, they may be speaking to the government."[309] As one scholar reasoned, given

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React to United States v. White, 47 VAND. L. REV. 857 (1994); Carol M. Bast, *What's Bugging You? Inconsistencies and Irrationalities of the Law of Eavesdropping*, 47 DEPAUL L. REV. 837 (1998).

[304] *White*, 401 U.S. at 787.

[305] Brian J. Serr, *Great Expectations of Privacy: A New Model for Fourth Amendment Protection*, 73 MINN. L. REV. 583, 594 (1989) (quoting WAYNE R. LAFAVE & JEROLD H. ISRAEL, CRIMINAL PROCEDURE, §3.2, at 99 (1985), for approval of privacy values expressed in Amsterdam, *supra* note 15, at 403).

[306] *See* Doernberg, *supra* note 41, at 290.

[307] *See* Maclin, *supra* note 11, at 215 n.127 (citing United States v. Caceres, 440 U.S. 741, 744 & n.2 (1979)).

[308] *Id.* at 215 (noting that the *White* decision demonstrated the "reasoning of *Katz* would have no impact on the law governing the use of informers and secret agents").

[309] Doernberg, *supra* note 41, at 292.

that "one never knows when the government may be listening," then the right of conversational "privacy vanishes whenever one communicates with another person."[310] No wonder, then, that *White* has been described as "inconsistent" with *Katz*.[311]

The possibility that *White*'s impact might be confined to informant cases was undermined by the fact that Justice White used the "expectations of privacy" rhetoric as the frame around the "risk" analysis borrowed from *Hoffa* as a core rationale in *White*.[312] In later cases, the Court developed the idea that a person's expectations should encompass the assumption of a risk of police surveillance, by drawing upon the *Katz* Court's observation concerning the lack of Fourth Amendment protection for "[w]hat a person knowingly exposes to the public, even in his own home or office."[313] Justice Harlan's *Katz* concurrence implied that only obvious examples of demonstrated indifference to privacy concerns would fail to satisfy the requirement of "subjective" manifestation of a privacy interest, such as the case of the loud talker inside a house who can be heard through an open window by people outside.[314] But the Court did not limit the concept of knowing exposure to match Harlan's category,[315] and instead blended the ideas of knowing exposure and assumption of risk into the analysis of reasonable expectations of privacy.

Another legacy of *White*'s approach to privacy analysis was inspired by Justice White's use of "inexorable logic" reasoning

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[310] *Id.* at 308. *Cf. id.* (arguing that the Court "used *Katz*'s rationale *de facto* to overrule one of the central holdings of *Katz*").

[311] Colb, *supra* note 236, at 141. *See* Peter P. Swire, *Katz is Dead, Long Live Katz*, 102 MICH. L. REV. 904, 910-11 (2004) (noting the Stored Communications Act of 1986 allows the government to obtain warrantless access to the content of stored telephone calls, so that as larger percentage of calls are stored, the protection for these calls provided by *Katz* and *Berger* will disappear).

[312] *See* United States v. White, 401 U.S. 745, 751-52 (1971). *Cf.* Maclin, *Informants*, *supra* note 168, at 621 (describing use of expectations analysis as "meaningless" in the *White* plurality opinion).

[313] Katz v. United States, 389 U.S. 347, 351 (1967) (citing United States v. Lee, 274 U.S. 559, 563 (1927) (holding the use of a search light at sea was not a "search"); Lewis v. United States, 385 U.S. 206, 210 (1967)).

[314] *See supra* note 134 and accompanying text.

[315] *See* Serr, *supra* note 305, at 624 (arguing that Stewart's reference to "knowing exposure" in *Katz* was an illustration of Harlan's lack-of-subjective-expectation category, and was not intended to be "the *sine qua non* of fourth amendment protection").

based on *Hoffa*. This reasoning implies that debates about new privacy claims can be resolved through reliance on logical extensions of privacy or no-privacy holdings, taken in isolation from the context of other privacy and search precedents. The "inexorable logic" reasoning contributed to the Court's post-*Katz* tradition of evaluating new claims primarily by making analogies to past privacy claims, many of which have been rejected since *Katz*.[316]

The Court's post-*White* privacy precedents illustrate how Harlan's "should" question about expectations and risks has been reformulated as an inquiry concerning logical inferences about the "knowing exposure" of a privacy interest. That is, if it appears that an individual knowingly exposed something, such as a garbage bag on a curb or heat emanating from a house, to a hypothetical observant member of the public, then the Court may choose to infer that privacy claimant knowingly exposed the garbage or the heat to police detection, and conclude that an expectation of privacy from such detection would be unreasonable.[317] After *Katz*, the isolation of the privacy precedents meant that the Court did not have to reconcile their rationales with the reasoning in the search precedents reflecting the expansion of the territory of the warrant requirement. Justice Harlan viewed these precedents as relevant sources to support the recognition of the privacy interest in *White*.[318]

Given the fact that *Katz* overruled *Olmstead*, it might seem astonishing to claim that the *White* decision accomplished "a return to *Olmstead*'s idea that words are not within the Fourth

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[316] *See* CLANCY, *supra* note 107, at 62-64 (enumerating rejected claims). *Cf.* California v. Ciraolo, 476 U.S. 207, 214-15 (1986) (relying on Knotts v. United States, 460 U.S. 276 (1983) and reasoning that unregulated helicopter surveillance of people in their back yards is justifiable as a logical extension of unregulated automobile surveillance of people traveling on streets and highways); Catherine Hancock, *Justice Powell's Garden: The Ciraolo Dissent and Fourth Amendment Protection for Curtilage Home Privacy*, 44 SAN DIEGO L. REV. 551, 562 (2007) (contrasting the "precedential power of analogy-making" by the *Ciraolo* majority with the different approach of the *Ciraolo* dissent).

[317] *Compare* California v. Greenwood, 486 U.S. 35, 40 (1988) *with* Kyllo v. United States, 533 U.S. 27, 42-44 (2001) (Stevens, J., dissenting).

[318] *Cf.* Hancock, *supra* note 316, at 560-61 (explaining how Justice Powell's dissent in *Ciraolo* relied on search precedents as well as privacy precedents as sources for determining expectations of "freedom from surveillance").

Amendment's protection."[319] However, even without expressing that sentiment directly, the *White* plurality did condition the exercise of the right to conversational privacy on the government's lack of interest in using a wired informant to listen to conversations. One thread of *Olmstead*'s reasoning received no attention in the *White* opinions, perhaps because the express reasoning of Katz repudiated it. The *Olmstead* opinion reasoned that anyone "who installs in his house a telephone instrument with connecting wires intends to project his voice to those quite outside." This argument could be translated into the proposition that every telephone user must assume the risk that a wiretapping agent is listening.[320] Similarly, the *Goldman* opinion reasoned that *Olmstead* should control the Court's decision, without actually saying that the *Goldman* defendants should have assumed that the office walls around them "had ears."[321] The *White* plurality opinion did not actually say the *White* defendant or anyone else should assume that the next person to whom they speak is a wired listener, whose power depends on the discretion of the government. But the *White* decision made that fact true.

CODA

Thirty years after Justice Harlan's retirement, each of his former law clerks contributed a brief "remembrance" to memorialize the anniversary of that event, and their recollections illustrate four hallmarks of Harlan's work in his *White* dissent. First, he "demanded, and strove for, clarity in his judgments,"[322] and "he wanted the arguments that formed his opinions to be

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[319] Doernberg, *supra* note 41, at 308.

[320] Olmstead v. United States, 277 U.S. 438, 466 (1928). *But see* Katz v. United States, 389 U.S. 347, 352 (1967) (reasoning that the *Katz* defendant was "surely entitled to assume that the words he utters into the mouth piece will not be broadcast to the world").

[321] For an example of a society where the walls "had ears," *see generally* DAS LEBEN DER ANDEREN [THE LIVES OF OTHERS] (Arte 2006).

[322] Charles Fried, *in* REMEMBRANCES, *supra* note 15, at 152. *See also* Norbert A. Schlei, *in* REMEMBRANCES, *supra* note 15, at 146 (noting that when Harlan received a draft opinion from a clerk, he copied out every word in longhand, "in order to force himself to think through every word, every sentence, to make sure it said what it should say and nothing else").

transparent, never hiding a premise or sliding over a fallacy or ignoring an ellipsis to reach a result."[323] He regarded "[a] rhetorical glide over a gap or fault in reasoning, an imperious *ipse dixit*" not only as "professional lapses" but as conduct that showed a "profound lack of courtesy towards those who must study, follow, and live with the consequences of what the Court decreed."[324] Second, regarding both his opinion writing and his treatment of others, one clerk recalled that "never did he ever say a harsh personal word about one of his colleagues, or indeed about anyone else."[325] Another clerk noted that Harlan "exemplified civility and tolerance" and that the "[a]cerbic personal references to other Justices, now featured in some opinions, would have distressed him."[326] Harlan's criticism of the *White* plurality opinion, for example, featured mild expressions such as the observation that one of the plurality's arguments "misses the mark entirely."[327]

Harlan's *White* dissent also displayed his willingness and ability to change his mind. One clerk reported that "[h]e was always open to argument,"[328] while another remembered "watching him change his mind two or three times as he weighed the merits and decided how to vote" in some cases.[329] In his *Lopez* opinion, Harlan concluded his analysis with the observation that the defendant's argument "amounts to saying that he has a constitutional right . . . to challenge [an] agent's credibility without being beset by corroborating evidence."[330] Harlan ex-

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[323] Heymann, *supra* note 15, at 152.

[324] Fried, *supra* note 322, at 152.

[325] Matthew Nimetz, *in* REMEMBRANCES, *supra* note 15, at 162; Kent Greenawalt, *in* REMEMBRANCES, *supra* note 15, at 158 (recalling that "[d]espite legal disagreements that nearly always left him in the minority, he expressed good feelings about the other Justices, declining, as many people would, to personalize disputes of substance or to attribute unwise judgment to stupidity or bad faith").

[326] Charles Lister, *in* REMEMBRANCES, *supra* note 15, at 162.

[327] United States v. White, 401 U.S. 745, 789 (1971) (Harlan, J., dissenting).

[328] *See, e.g.*, Lister, *supra* note 326, at 162.

[329] Stoel, *supra* note 248, at 165. *See* Leonard M. Lieman, *in* REMEMBRANCES, *supra* note 15, at 146 (remembering Harlan as "independent and open-minded").

[330] Lopez v. United States, 373 U.S. 427, 439 (1963). *Cf.* Brief for the United States, *supra* note 7, at 18 (describing the "only interests of which [the defendant] was deprived by the transmitting device" as being "those which directly violate the integrity of the criminal process").

plained in his *White* dissent, "I am now persuaded that such an approach misconceives the basic issue . . . ."[331] In his dissent in *On Lee*, Justice Douglas described his realization that he voted the wrong way in *Goldman*.[332] Justice Harlan's *White* dissent echoed the themes in Douglas's own *White* dissent, along with the themes of the *Lopez* dissenters.[333]

Finally, Harlan's "love for the law and the Court" was vividly recalled by his clerks.[334] During his final term, his clerks devoted sixty hours a week to the chore of reading to Harlan because he was nearly blind.[335] He wrote the *White* dissent during the last four months of that term, when he suffered from severe lower back pains, diagnosed the following autumn as the symptoms of cancer.[336] Yet Harlan continued to "give his all" to the Court.[337] In *White*, he gave his all to the Fourth Amendment.

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[331] *White*, 401 U.S. at 788 n.24 (Harlan, J., dissenting). *Cf. id.* (noting that "the continuing vitality of *Lopez* is not drawn directly into question" in *White*, and not joining other *White* opinions which advocated overruling of *Lopez*).

[332] On Lee v. United States, 343 U.S. 747, 762 (1952) (Douglas, J., dissenting) (observing, "I now more fully appreciate the vice of the practices spawned by *Olmstead* and *Goldman*. Reflection upon them has brought new insight to me. I know feel that I was wrong in the *Goldman* case.").

[333] *Compare White*, 401 U.S. 756-57, 759-60 (Douglas, J., dissenting), *with id.* at 789-90, 787-88, 778 & n.12 (Harlan, J., dissenting).

[334] Nimetz, *supra* note 325, at 161; *cf.* E. Barrett Prettyman, Jr., *in* REMEMBRANCES, *supra* note 15, at 145 (reporting that Harlan "loved discussions about every aspect of the law"); Fried, *supra* note 322, at 151 (noting that Harlan's "love for the Court and for the rule of law was legendary").

[335] YARBROUGH, *supra* note 4, at 325.

[336] *See* YARBROUGH, *supra* note 4, at 330-335 (describing how, after months of medical tests, Harlan retired after receiving the diagnosis of spinal cancer in late September, and died on December 29, 1971).

[337] Schlei, *supra* note 322, at 146 ("The Justices he respected most were not necessarily those who agreed with him most often but those who felt as he did about the importance of the work of the Court and gave their all to it.").

KNOWING "CONSENT" MEANS "KNOWING CONSENT": THE UNDERAPPRECIATED WISDOM OF JUSTICE MARSHALL'S *SCHNECKLOTH V. BUSTAMONTE* DISSENT

Arnold H. Loewy[*]

The first task of one who is asked to speak about great Fourth Amendment dissents is to ascertain what constitutes greatness. Historically, greatness has contained two components: prescience and correctness. The former is objective: Did it ultimately prevail? The latter is normative: That is, was it correct in the mind of the evaluator?

Justice Holmes is classically regarded as the Great Dissenter. His classic dissents in Commerce Clause,[1] Due Process,[2] and Free Speech[3] cases are practically the paradigm of great dissents. Of course, one who liked the original result in those cases, but did not like the result in the dissent-inspired sequels would not think of these dissents as great. Indeed, one who thinks that only states should be able to regulate child labor, that no government should be able to regulate wages and hours, and that free speech should only apply to advocacy of lawful activities will rue the existence of Justice Holmes and his "stupid opinions" that others consider great.

By the criteria of prescience and correctness, there are few Fourth Amendment dissents that could be considered great. Perhaps Justice Brandeis's and Justice Holmes's dissents in *Olmstead v. United States*[4] would qualify, but only one of us

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[1] *See* Hammer v. Dagenhart, 247 U.S. 251, 277-81 (1918) (Holmes, J., dissenting).

[2] *See* Lochner v. New York, 198 U.S. 45, 65-72 (1905) (Holmes, J., dissenting).

[3] *See* Abrams v. United States, 250 U.S. 616, 624-31 (1919) (Holmes, J., dissenting).

[4] *See* Olmstead v. United States, 277 U.S. 438, 471-485 (1928) (Brandeis, J, dissenting), 469-72 (1928) (Holmes, J., dissenting).

could talk about that and Carol Steiker has beaten me to it.[5] So, I have chosen to rethink the "prescience" criterion.[6]

Indeed, it is the absence of realized prescience that makes Justice Marshall's dissent in *Schneckloth v. Bustamonte* so tragic. Not only was the majority woefully wrong and the dissent clearly correct (normatively speaking), but the failure of the Court to appreciate the correctness of the dissent has led to a burgeoning jurisprudence of placing a premium on citizens' ignorance of their Fourth Amendment rights.[7]

For the reasons that I will explain today, it is my fondest hope that the lack of prescience of Justice Marshall's opinion is not an absence, but merely delayed fulfillment. *Schneckloth* is, after all *only* thirty-six years old. Holmes's dissent in *Abrams* was not fully accepted for nearly fifty years.[8] Candidly, but sadly, I have to note that judicial momentum has not been kind to Justice Marshall's dissent. Indeed, in case after case, as I shall explain, movement has been away from his dissent, and towards enlarging the original error of the majority opinion. So, if you share my assessment of the wisdom of Justice Marshall's dissent, perhaps the best we can hope for is that Marshall's opinion was so prescient that its wisdom will be recognized by many judicial generations after the fact.

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[5] Carol Steiker, *Brandeis in* Olmstead*: "Our Government is the Potent, the Omnipresent Teacher"*, 79 MISS. L.J. 147 (2009).

[6] Two other dissents that ultimately prevailed that perhaps I could have chosen are Justice Frankfurter's dissent in *United States v. Rabinowitz*, and Justice Douglas's dissent in *Wolf v. Colorado*. United States v. Rabinowitz, 339 U.S. 56, 68-86 (1950) (Frankfurter, J., dissenting), *overruled by* Chimel v. California, 395 U.S. 752 (1969) (adopting Justice Frankfurter's dissent in *Rabinowitz*); Wolf v. Colorado, 338 U.S. 25, 40-41 (1949) (Douglas, J., dissenting), *overruled by* Mapp v. Ohio, 367 U.S. 643 (1961) (adopting Justice Douglas's dissent in *Wolf*). Ironically, both *Chimel* and *Mapp* are on shakier ground now than when they were decided, largely because of the work of Justice Scalia. *See* Thornton v. United States, 541 U.S. 615, 625-32 (2004) (Scalia, J., concurring); Arizona v. Gant, 129 S. Ct. 1710, 1724-25 (2009) (Scalia, J., concurring); Hudson v. Michigan, 547 U.S. 586 (2006).

[7] *See* Arnold, H. Loewy, *Police, Citizens, the Constitution, and Ignorance: The Systematic Value of Citizen Ignorance in Solving Crime, Police Deception, and the Constitution: A Symposium*, 39 TEX. TECH L. REV. 1077 (2007).

[8] *See* Brandenburg v. Ohio, 395 U.S. 444, 451-52 (1969).

I. THE FACTS

At 2:40 in the morning, while driving the streets of Sunnyvale, California, with five passengers, Joe Gonzalez was pulled over by Officer James Rand for driving with a burned-out headlight and license plate light.[9] Gonzalez could produce neither registration for the vehicle nor a driver's license.[10] The other five passengers were then asked for evidence of identification, and only one passenger, Joe Alcala, was able to produce a driver's license, and he claimed that the car belonged to his brother.[11]

Then, according to the Court: "[T]he six occupants . . . stepped out of the car at the officer's *request*. . . ."[12] Surely, the word "request" is misleading. Assuming the officer said something like: "Will you please step out of the car," it seems highly unlikely that the occupants really believed they had a choice. And if they did, they would have been wrong.[13] Surely six men driving around in a car with no proof of ownership and most with no identification could not have believed that they were free to ignore the officer's request (or more accurately, polite demand) to exit the car.

Then, two more officers arrived.[14] After being buttressed by these reinforcements, Officer Rand "*asked* Alcala if he could search the car."[15] Alcala responded: "Sure, go ahead."[16] There is no allegation that officer Rand used any coercion beyond that inherent in an officer's politely demanding that six people leave their undocumented car at nearly three in the morning after two reinforcement officers had driven up to join the show of force before the requested search.[17] The police found a stolen

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[9] Schneckloth v. Bustamonte, 412 U.S. 218, 220 (1973).

[10] *Id.*

[11] *Id.*

[12] *Id.* (emphasis added).

[13] *See generally* the later case of Maryland v. Wilson, 519 U.S. 408, 410 (1997) (holding that a police officer may order both the driver and passenger out of the vehicle after a lawful traffic stop).

[14] *Schneckloth*, 412 U.S. at 220.

[15] *Id.* (emphasis added).

[16] *Id.*

[17] *Id.*

check which was used to convict one of the car's passengers, Robert Bustamonte.[18]

II. NON-ISSUES

There are three possible ways the Court might have decided the case without having to consider the consent issue. Of these three, two were never argued, and the third, which was argued, was not considered by the Court.

First, it would have been possible to argue that given all of the circumstances of this case, six men, near three in the morning, no proof of car ownership, etc., that a search of the car should have been deemed reasonable under the Fourth Amendment. Though not devoid of plausibility, the Government did not choose to make that argument, and the case was decided as though there were no probable cause, or even reasonable suspicion. Consequently, that option was off the table.

Second, it would have been possible to decide that as a mere passenger in the vehicle, Bustamonte lacked standing to challenge the constitutionality of the search. Though a similar position was sustained several years later in *Rakas v. Illinois*,[19] it was neither suggested nor considered in this case. Thus, the case proceeded on the assumption that Bustamonte had standing to challenge the illegality of the search. So this option was also off the table.

Finally, it would have been possible to conclude that Bustamonte's Fourth Amendment claim was not cognizable on habeas corpus, as the Court held a few years later in *Stone v. Powell*.[20] Unlike the other two non-issues, this one actually was argued, and three of the Justices (Powell, Burger, and Rehnquist) would have found against Bustamonte on that ground alone.[21] Justice Blackmun was prepared to join them, but for his belief that it was unnecessary due to his agreement with the majority opinion (which Powell, Burger, and Rehnquist also joined).[22]

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[18] *Id.*

[19] *See* Rakas v. Illinois, 439 U.S. 128, 132-38 (1978).

[20] 428 U.S. 465, 494 (1976).

[21] *Schneckloth*, 412 U.S. at 250 (Powell, J., concurring).

[22] *Id.* at 259 (Blackmun, J., concurring).

Consequently, although the case might have been disposed of on that ground, it was not.

The upshot of all of this is that, while there may have been several reasons to find against Bustamonte, the *only* one relied on by the Court was that his otherwise valid and cognizable Fourth Amendment right was waived by Alcala's consent to the search.

III. THE LOGIC OF THE MAJORITY

Justice Stewart, who wrote the majority opinion began by narrowing the conflict, noting that Bustamonte had conceded "that a search conducted pursuant to a valid consent is constitutionally permissible,"[23] and that the prosecutor had conceded that "he has the burden of proving that the consent was, in fact, freely and voluntarily given."[24] Stewart then concluded that the issue squarely presented was whether a consent could be proven voluntary without proof that the defendant was aware of his right to decline consent.

Obviously, the word "voluntary" is capable of multiple meanings. In the criminal law, for example, as applied to actus reus, the term simply means a muscularly willed movement.[25] Thus, if one consciously moves his finger, he would be said to have voluntarily acted even if he did not know that his finger was on the trigger of a gun and another person was in the line of fire.[26] The defendant might be able to defend (if it were true) on the ground that he did not act knowingly, recklessly, or negligently, but he could not claim that he didn't act voluntarily.

Fortunately, Justice Stewart did not define "voluntary" so narrowly.[27] Rather, he focused on the cases dealing with "voluntary confessions."[28] There the Court employed a balancing test, never relying on any one factor, including the defendant's

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[23] *Id.* at 222 (majority opinion).

[24] *Id.* (internal citations omitted).

[25] FREEDOM AND RESPONSIBILITY 129-30 (Herbert Morris ed., Stanford University Press 1961).

[26] *Id.*

[27] *Schneckloth,* 412 U.S. at 218.

[28] *Id* at 227.

awareness of his right to remain silent.[29] Thus, Justice Stewart concluded that awareness of the right to decline consent was only one factor (and apparently not a terribly important one) in assessing voluntariness (and hence validity) of consent.[30]

Ironically, probably the least controversial aspect of the *Miranda* case, which essentially rendered voluntariness largely irrelevant in the area of confessions, was the requirement that the arrestee be told that he had a right to remain silent.[31] The dissents and much of the literature criticized the Court for announcing a right to counsel during interrogation, but nobody seriously questioned the right of the defendant to know of his right to remain silent.[32] Even Professor (and former Federal Judge) Paul Cassell, one of *Miranda's* most vehement critics, does not quarrel with the requirement that an accused be informed of his right to remain silent.[33]

So what value did the Court think it was serving by allowing ignorant consent? The Court put it this way:

> In situations where the police have some evidence of illicit activity, but lack probable cause to arrest or search, a search authorized by a valid consent may be the only means of obtaining important and reliable evidence. In the present case for example, while the police had reason to stop the car for traffic violations, the State does not contend that there was probable cause to search the vehicle or that the search was incident to a valid arrest of any of the occupants. Yet, the search yielded tangible evidence that served as a basis for a prosecution, and provided some assurance that others, wholly innocent of the crime, were not mistakenly brought to trial. And in those cases where there is probable cause to arrest or search, but where the police lack a warrant, a consent search may still be valuable. If the search is conducted and proves fruitless, that in itself may convince the police that an arrest with its possible stigma and embarrassment is unnecessary, or that a far more

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[29] *Id.*

[30] *Id.* at 218.

[31] Miranda v. Arizona, 384 U.S. 436, 468 (1966).

[32] *See, e.g., id.* at 504-26 (Harlan, J., dissenting).

[33] *See* Paul G. Cassell, *The Statute that Time Forgot: 18 U.S.C. § 3501 and the Overhauling of Miranda*, 85 IOWA L. REV. 175, 257 (1999).

> extensive search pursuant to a warrant is not justified. In short, a search pursuant to consent may result in considerably less inconvenience for the subject of the search, and, properly conducted, is constitutionally permissible and wholly legitimate aspect of effective police activity.[34]

Of course, these are good reasons to encourage consent. As the Court put it later in its opinion, "It is an act of responsible citizenship for individuals to give whatever information they may have to aid in law enforcement."[35] But what is noticeably lacking in Justice Stewart's opinion is a reason for valuing the searchee's ignorance.

Let me illustrate the difference. Assume I am driving from Lubbock to Dallas in my white Saturn. Assume further that a policeman pulls me over and tells me the following: "We had a report that somebody driving a white Saturn from Lubbock to Dallas is carrying heroin in his trunk. I'd like to search your trunk to see if it's you. You don't have to let me, but I'd sure appreciate it if you did." I might well decide as a good citizen, as well as one who would like to remove a cloud of suspicion, that consenting to this polite request to search would be a good idea.

Now, change the facts slightly. This time the officer stops me and asks if I am carrying drugs. Upon my negative response, he asks: "May I search your car?" Although I may be aware that "no" is a permissible response, most drivers would not. They would yield to authority because they think they have to rather than because they want to. Unlike the first hypothetical, this is not "responsible citizenship." It is ignorant submission.

Basically, the Court seems to take two positions: (1) coerced consent is forbidden and (2) unknowing consent is not. Thus, if the police ask nicely, and the suspect consents, all is good because coercion is absent. Indeed, if one believes that unknowing consent can render a search reasonable, there is little to quarrel with the Court's opinion.

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[34] *Schneckloth*, 412 U.S. at 227-28.

[35] *Id.* at 232 (quoting *Miranda*, 384 U.S. at 477-78).

It should be noted that although the effect of the decision is to allow ignorant consents, its concern appears more related to burden of proof. The Court talks about the "near impossibility of meeting this prosecutorial burden."[36] The Court suggests and rejects what one might have thought was the obvious answer to its conundrum: "[I]t would be thoroughly impractical to impose on the normal consent search the detailed requirements of an effective warning."[37] So, in the Court's view, because a warning would be impractical, proving knowing consent would be an impossible burden.

Undoubtedly, if the Court's impracticality premise were correct, its conclusion would be arguable. As will become apparent when we examine Justice Marshall's "great" dissent, a warning would not be at all impracticable. Furthermore, if the impracticality of proving consent were really driving the Court's opinion, presumably the Court would have at least excluded evidence where the defendant could show that he did not know that he could refuse. Yet as the great dissent pointed out, the Court did not even accept this modest proposal.

IV. THE GREAT DISSENT

Justice Marshall begins his opinion by referring to the Court's "*curious result* that one can choose to relinquish a constitutional right—the right to be free from unreasonable searches—without knowing that he has the alternative of refusing to accede to a police request."[38] If anything, Justice Marshall was charitable in his use of the word "curious." If he were wont to speak like Chief Justice Burger, he might have used the word "bizarre."[39] Or to be completely accurate, he could have said "oxymoronic."

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[36] *Schneckloth*, 412 U.S. at 230.

[37] *Id.* at 231.

[38] *Id.* at 277 (Marshall, J., dissenting) (emphasis added).

[39] *See* Brewer v. Williams, 430 U.S. 387, 417 (1977) (Burger, C.J., dissenting) ("I categorically reject the remarkable notion that the police in this case were guilty of unconstitutional misconduct, or any conduct justifying the *bizarre* result reached by the Court.") (emphasis added). *See* Maine v. Moulton, 474 U.S. 159, 181 (1985) (Burger, C.J., dissenting) ("Nothing whatever in the Constitution or our prior opinions supports this *bizarre* result, which creates a new 'right.'") (emphasis added).

So one might ask, what is so "great" about recognizing such an obvious truism? My answer is that when one can see the obvious where all others are missing it, there is something great about the person who sees it. Perhaps it is nothing more than the ability to avoid distracting irrelevancies, much like the boy who knew that the emperor had no clothes.[40]

In criticizing the Court's reliance on the concept of "voluntary" in the confession cases, Marshall makes what might be his most telling point in, of all places, a footnote. Though not yet having reached the notoriety of *Carolene Products*' famous footnote 4[41] or *Brown v. Board of Education*'s footnote 11,[42] the wisdom of Justice Marshall's footnote 6 should not be ignored. In response to the Court's contention that voluntary consent means the same thing as voluntary confession, footnote 6 says: "That this application of the 'domino' method of adjudication is misguided is shown, I believe, by the fact that 'voluntary consent' seems redundant in a way that the phrase 'voluntary confession' does not."[43]

To illustrate, the phrase "involuntary confession" seems to accurately describe the situation where a police officer tortures a suspect into confessing. We would say that he confessed, but it was involuntary. On the other hand, where an officer tortures a suspect until he consents to a search, we would not say that he involuntarily consented. We would, instead, say that he did not consent at all. Indeed, that was essentially the Court's holding in *Bumper v. North Carolina,* where a woman consented to a search only after being told that the police had a search warrant.[44]

Building on this dichotomy, Justice Marshall proceeds to distinguish "coercion" from "consent," explaining that voluntariness is relevant to the issue of coercion, but not to consent.[45]

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[40] *See* HANS CHRISTIAN ANDERSEN, *The Emperor's New Clothes, in* ANDERSON'S FAIRY TALES 263 (Mrs. E. V. Lucas & Mrs. H.B. Paull, trans., Grosset & Dunlap 1945) (1837).

[41] United States v. Carolene Products, 304 U.S. 144, 153 n.4 (1938).

[42] Brown v. Bd. of Educ., 347 U.S. 483, 495 n.11 (1954).

[43] *Schneckloth*, 412 U.S. at 280 n.6 (1973).

[44] *See* Bumper v. North Carolina, 391 U.S. 543, 546-47 (1968).

[45] *Schneckloth,* 412 U.S. at 283-84 (Marshall, J., dissenting).

He uses *Bumper* as an illustration, noting that, while under all of the circumstances of that case, the woman's consent may have been involuntary, the decision was not predicated on that ground. Rather, it was predicated on her not making a choice to give up a known right, and thus not consenting at all.[46] By way of illustration, consider the rapist who points a gun at his victim, saying, "Consent to sex or I'll blow your brains out." We would not treat her "ok" as an involuntary consent. We would say that she did not consent at all.

The great dissent then goes on to suggest that, "If the consent to search means that a person has chosen to forgo his right to exclude the police from the place they seek to search, it follows that his consent cannot be considered a meaningful choice unless he knew that he could in fact exclude the police."[47] Marshall adds, "I can think of no other situation in which we would say that a person agreed to some course of action if he convinced us that he did not know that there was some other course that he might have pursued."[48]

Frankly, I find such logic impossible to refute, which may explain why the Court never attempted to refute it. Rather, the Court did what it must when confronted with this kind of logic against its position. It ignored it. Plausibly, I suppose one could have argued with Marshall's dependent clause, ("[i]f consent to search means that a person has chosen to forgo his right to exclude the police from the place they seek to search"[49]) and contended instead that an uncoerced, albeit unknowing, consent rendered the search reasonable.

Such was the logic of the Court's subsequent decision, *Illinois v. Rodriguez*,[50] a decision with which I have no quarrel. In *Rodriguez*, again over Marshall's dissent, the Court held that consent predicated on a reasonable belief that the defendant's former co-tenant had authority to consent to a search, rendered

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[46] *Id.*
[47] *Id.* at 284-85.
[48] *Id.* at 285.
[49] *Id.* at 284.
[50] 497 U.S. 177, 188-89 (1990) (Marshall, J. dissenting).

the search reasonable, and thus constitutional.[51] Thus, if the Court had found that Officer Rand reasonably believed that Alcala had knowingly consented to the search of the car, and that the search was therefore reasonable, the opinion would have made a great deal more sense (though candidly Marshall still would not have agreed with it).[52]

Of course, there is no evidence that Officer Rand thought any such thing. Instead, the Court was willing to go with the untenable proposition that absent actual consent, the search would have been invalid, but one can give up his constitutional right to be free from an unreasonable search, even if in doing so, he did not know that he had a choice. So, rather than quarreling with Marshall's logic, the Court simply ignored it.

Marshall then jumps to the heart of the majority's reasoning, namely that a warning would be impractical because it would break the informality. He understates: "I doubt that a simple statement by an officer of an individual's right to refuse consent would do much to alter the informality of the exchange, except to alert the subject to a fact that he surely is entitled to know."[53] Indeed, I wish he had gone further and spelled out his obvious truism inasmuch as it was not so obvious to the majority. He could have used the following illustration: "Joe, I'd like you to let me search your car. You don't have to if you don't want to, but I'd sure appreciate it if you did."

How on earth can a warning like that be said to break the informality? That question, I think is unanswerable. Indeed, such a warning would have made the discussion less formal, not more, causing Marshall to "conclude with some reluctance that when the Court speaks of practicality, what it is really talking of is the continued ability of the police to capitalize on the ignorance of citizens to accomplish by subterfuge what they could not achieve by relying only on the knowing relinquishment of constitutional rights."[54] He adds: "Of course it would be

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[51] *Cf.* Ric Simmons, *Not "Voluntary" but Still Reasonable: A New Paradigm for Understanding the Consent Searches Doctrine*, 80 IND. L.J. 773 (2005).

[52] *See Rodriguez*, 497 U.S. at 189-98 (Marshall, J., dissenting).

[53] *Schneckloth*, 412 U.S. at 287 (Marshall, J., dissenting).

[54] *Id.* at 288.

'practical' for the police to ignore the commands of the Fourth Amendment, if by practicality we mean that more criminals will be apprehended, even though the constitutional rights of innocent people also go by the boards."[55]

These sentences are truly "The Emperor has no clothes" coup de grace.[56] He strips bare the Court's ridiculous assertion of the need for informality, then lays out in no uncertain terms precisely what was afoot: the Court's disrespect of sound Fourth Amendment theory.

And, for those who might think, "Oh well, another criminal is off the street and no harm done," let us not forget Justice Marshall's concern for the innocent. How, one might ask, are the rights of innocent people relevant? The answer, as I have written elsewhere,[57] is that the procedure sanctioned in this case will subject far more innocent people to a search because they may consent when they think they have no choice. Indeed, it is at least possible that Alcala, who may have believed he had nothing to hide, and so far as we know was innocent, believed that he had no choice after being confronted by Officer Rand and the two other policemen who drove up behind him in the wee hours of the morning.

More importantly, as we look at what *Schneckloth* has wrought, we will get some idea of how many innocent people have been unnecessarily subject to a search that (1) would have been unlawful without their consent and (2) for which they had no idea that they were free to "just say no."

V. WHAT *SCHNECKLOTH* HATH WROUGHT (*OHIO V. ROBINETTE*)

For the Supreme Court, *Ohio v. Robinette*[58] was an easy case, wrongly decided by the Ohio Supreme Court, in light of *Schneckloth*. Robinette was stopped by Officer Robert Newsome for speeding in a construction zone.[59] Robinette gave Newsome

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[55] *Id.*

[56] *See* ANDERSEN, *supra* note 40.

[57] *See generally* Arnold H. Loewy, *The Fourth Amendment as a Device for Protecting the Innocent*, 81 MICH. L. REV. 1229, 1257-59 (1983).

[58] 519 U.S. 33 (1996).

[59] *Id.* at 35.

his license and exited the car after being asked to do so.[60] Newsome then returned Robinette's license and issued him a warning.[61] Then, as captured by Newsome's video camera, the following dialogue occurred:

> Newsome: "One question before you get gone: [A]re you carrying any illegal contraband in your car? Any weapons of any kind, drugs, anything like that?"
>
> Robinette: "No."[62]

Newsome then asked for and received consent to search Robinette's car where he found a small amount of illegal drugs.[63]

The Ohio Supreme Court reversed Robinette's conviction, holding that before a police officer could seek consent to search, he was required to tell the motorist that he was free to leave.[64] Relying on and quoting *Schneckloth*, Chief Justice Rehnquist opined:

> And just as it 'would be thoroughly impractical to impose on the normal consent search the detailed requirements of an effective warning,'[65] so too would it be unrealistic to require police officers to always inform detainees that they are free to go before a consent to search may be deemed voluntary.[66]

Well, far be it from me to advocate unrealism. Indeed, if *Schneckloth* had been correctly reasoned there is some logic to extending it to a person's false belief that he is not being detained. But how many people who have been stopped by a policeman, given a warning ticket, and heard the policeman utter the words "Before you get gone," would know they were free to leave? Yet, if the driver were not free to leave, as he almost certainly believed was the case, the consent would not have been

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[60] *Id.*
[61] *Id.*
[62] *Id.* at 36.
[63] *Id.* at 35-36.
[64] *Id.* at 38.
[65] *Schneckloth*, 412 U.S. at 231.
[66] *See Robinette*, 519 U.S. at 39-40.

valid (unless, of course, the policeman had a right to detain him, which nobody on the Court even suggested was the case).[67]

So what does all this mean for the innocent driver, who unlike Robinette has nothing to hide? It means that large numbers of them are going to be stopped for minor traffic offenses, asked for consent to search with no understanding of either their right to leave or their right to say "no." How many? Well, Deputy Newsome testified that he routinely requested permission to search automobiles that he stopped for traffic violations.[68] And, in another case, he testified that in the year of Robinette's arrest, he requested consent in 786 traffic stops.[69]

Even if we assume that Newsome was above the curve in requesting searches (without telling people that they were either free to leave or free to say "no"), there were probably thousands of motorists in Ohio whose cars were searched, who had no idea that they were free to leave and free to refuse the search. Voluntary cooperation with the police is a wonderful thing and should be encouraged. But the embarrassment, humiliation, and just plain loss of valuable time suffered by our innocent citizens is considerably less wonderful. Let me illustrate. Posit a businessman stopped by Officer Newsome. With no knowledge of his right to refuse, he consents to a search despite being late for a business meeting (which is why he was speeding in the first place). The officer goes through his briefcase looking for drugs, and in the course thereof leaves his business notes in disarray. Consequently, the businessman is both late for his meeting and disorderly in his presentation.

The Government's ability to so inconvenience our citizenry is directly attributable to *Schneckloth*'s conclusion that ignorance, even if not bliss, is no cause for Fourth Amendment concern. Justice Marshall understood what such a rule could have on the innocent. If Deputy Newsome is at all typical, his fears have come to pass. Ironically, Deputy Newsome and others like him are no longer free to dupe the citizenry in Ohio, because on

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[67] *See, e.g.*, Florida v. Royer, 460 U.S. 491, 498 (1983) (requiring at least reasonable suspicion before one could be justifiably detained).

[68] *Robinette*, 519 U.S. at 40 (Ginsburg, J., concurring).

[69] State v. Retherford, 93 Ohio App. 3d 586, 594 (1994).

remand, the Ohio Supreme Court held that the Ohio Constitution does require that citizens be informed that they are free to leave before being asked for consent.[70]

CONCLUSION

Nine years, prior to *Schneckloth*, in 1964, Judge Madden of the Ninth Circuit (of all places), with remarkable candor, wrote the following:

> While it may not be 'in accord with common experience' for a guilty person to consent to a search which, if successful, may help to prove his guilt, it may nevertheless occur. Happily, not all criminals are highly intelligent and use the most effective tactics in their contacts with the police. Again happily, sometimes their contacts with the police confuse them, and they say and do things which, after deliberation, they regret. To whatever extent stupidity or confusion on the part of the guilty person contributes to the prompt acquisition by the police of evidence of crime, so that the police can get back to work on the numerous cases which may remain unsolved, society is the gainer and nobody is the loser of anything to which he is constitutionally entitled.[71]

Frankly, Justice Stewart's opinion in *Schneckloth* said the same thing, but without the transparency of Judge Madden's candor. Even without the transparency, Justice Marshall clearly saw what the decision would do to the innocent, as well as the guilty, and perhaps most importantly to the Constitution that we are all supposed to live under. It is my fondest hope that someday, preferably in my lifetime, the wisdom of this magnificent dissent will be fully appreciated, and that a future Court will return us to the Constitution under which we are supposed to live.

Were this just a law review article, it would end here. But it is not just a law review article; it is an opportunity to speak to state appellate judges, the one group of people who can do some-

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[70] State v. Robinette, 73 Ohio St. 3d 650, 655 (1995).

[71] Martinez v. United States, 333 F.2d 405, 407 (9th Cir. 1964) (quoting United States v. Gregory, 204 F. Supp. 884, 885 (S.D.N.Y. 1962)).

thing about consent searches. You cannot, of course, directly mold federal constitutional law, but you can mold state constitutional law. Under your state constitutional prohibition against unreasonable searches, you have the power to hold that searches conducted pursuant to consent are unconstitutional unless there is good reason to believe that the searchee knew of his right to refuse consent. You could even require that police give a specific warning such as, "You don't have to let me search, but I'd sure appreciate it if you did."

When the result of such a holding overturns a criminal conviction, you might feel some reluctance to so rule (especially if you have to run for reelection). But as Justice Scalia, of all people, once wisely observed, "[T]here is nothing new in the realization that the Constitution sometimes insulates the criminality of a few in order to protect the privacy of us all."[72] So, in explaining your opinion, you should emphasize that you are doing it for all of the innocent citizens of your state. You should explain that you are freeing them from being subject to importuning, and frankly bullying, police officers who obtain consent to search from unwitting citizens, simply because they know they can. Ohio took a major step in that direction in *Robinette,* and there is good reason for other states to follow suit.

If you agree with me that the *Schneckloth* domain is not the type of society under which we are supposed to be living, your decisions can make a real difference. First, at minimum, you will free the innocent citizens of your state from such importuning. And second, if enough of you so rule, the Supreme Court is likely to take notice. For example, between 1949 and 1961, enough states chose to adopt the exclusionary rule that when *Mapp v. Ohio*[73] was decided, the Court elected to abandon the *Wolf v. Colorado*[74] majority, and follow its dissent. And thus the exclusionary rule became applicable to the states.

Similarly, it is my firm belief that a groundswell of state indignation towards the *Schneckloth* decision may well cause the Supreme Court to rethink this sorry chapter in our Fourth

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[72] Arizona v. Hicks, 480 U.S. 321, 329 (1987).
[73] 367 U.S. 643, 654-55 (1961).
[74] 338 U.S. 25, 25-30 (1949), *overruled by* Mapp v. Ohio, 367 U.S. 643 (1961).

Amendment jurisprudence. Then perhaps, just perhaps, Justice Marshall's great dissent will become the law of the land.

REASONABLENESS AS A RULE: A PAEAN TO JUSTICE O'CONNOR'S DISSENT IN *ATWATER V. CITY OF LAGO VISTA*

Wayne A. Logan[*]

When invited to participate in this symposium, and asked to identify a particular dissent from the Supreme Court's Fourth Amendment caselaw to focus upon, many candidates came to mind. The dissents of Justices Douglas in *Terry v. Ohio*[1] and Brandeis in *Olmstead v. United States*[2] had strong immediate appeal, and indeed are ably addressed by other symposium contributors.[3] I wished, however, to consider a dissent of more recent vintage—yet one having similar foundational force relative to Fourth Amendment principles and significant impact on policing and civil liberties. With these criteria in mind, I soon settled upon my dissent of choice: that of Justice Sandra Day O'Connor in *Atwater v. City of Lago Vista*.[4]

Atwater, the "soccer mom" case as it has come to be known, answered a basic question long left unresolved by the Court:

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[1] 392 U.S. 1, 35 (1968) (Douglas, J., dissenting).

[2] 277 U.S. 438, 471 (1928) (Brandeis, J., dissenting).

[3] *See* Carol Steiker, *Brandeis in* Olmstead: *"Our Government is the Potent, Omnipresent Teacher"*, 79 MISS. L.J. 147 (2009); Paul Butler, *"A Long Step Down the Totalitarian Path": Justice Douglas's Great Dissent in* Terry v. Ohio, 79 MISS. L.J. 9 (2009). The question of what qualifies as a great dissent has inspired considerable interest of late. *See* I DISSENT: GREAT OPPOSING OPINIONS IN LANDMARK SUPREME COURT CASES (Mark Tushnet ed., 2008); William J. Brennan, *In Defense of Dissents*, 37 HASTINGS L.J. 427 (1986); Robert G. Flanders, *The Utility of Separate Judicial Opinions in Appellate Courts of Last Resort: Why Dissents are Valuable*, 4 ROGER WILLIAMS U. L. REV. 401 (1999); Lani Guinier, *Foreword: Demosprudence Through Dissent*, 122 HARV. L. REV. 4 (2008); Allison O. Larsen, *Perpetual Dissents*, 15 GEO. MASON L. REV. 447 (2008); Randall T. Shepard, *What Can Dissents Teach Us?*, 68 ALB. L. REV. 337 (2005).

[4] 532 U.S. 318 (2001).

whether a warrantless arrest for a minor offense violates the reasonableness clause of the Fourth Amendment, the Amendment's "touchstone."[5] In her dissent, joined by Justices Stevens, Ginsburg, and Breyer, Justice O'Connor condemned the majority's approval of a motorist's custodial arrest for failure to wear a seatbelt, punishable under Texas law only by a modest fine.[6] The outcome, O'Connor fairly concluded, afforded police "constitutional carte blanche to effect an arrest whenever there is probable cause to believe a fine-only misdemeanor has been committed," an outcome "irreconcilable with the Fourth Amendment's command that seizures be reasonable."[7] While conceding the administrative appeal of providing police the unqualified right to arrest for any and all offenses, Justice O'Connor asserted that such appeal "by no means trumps the values of liberty and privacy at the heart of the Amendment's protections."[8] Administrative ease, O'Connor insisted, falls "far short of rationalizing the extraordinary intrusion on Gail Atwater and her children."[9]

The majority's decision to equate probable cause with reasonableness had two major ramifications, according to Justice O'Connor. First, with probable cause now serving as both a necessary and sufficient basis for arrest, police were free to invoke their arrest power for a myriad of minor offenses, having major impact on the "everyday lives of Americans."[10] Second, with broadened warrantless arrest authority comes an "arsenal" of police powers, including the power to search cars and drivers and inventory the contents of their vehicles.[11] The "unbounded discretion" afforded police to execute arrests and exercise such powers, Justice O'Connor reasoned, carried a "grave potential for abuse."[12]

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[5] Samson v. California, 547 U.S. 843, 855 n.4 (2006).
[6] *Atwater*, 532 U.S. at 360 (O'Connor, J., dissenting).
[7] *Id.* at 366.
[8] *Id.*
[9] *Id.* at 371, 373.
[10] *Id.* at 371.
[11] *Id.* at 372.
[12] *Id.*

In the space available here, I will seek to make the case that Justice O'Connor's *Atwater* dissent, wise when offered almost a decade ago, and prescient in light of subsequent events, is deserving of a place in the pantheon of the Court's great Fourth Amendment dissents.

I. *ATWATER* AND THE DEMISE OF REASONABLENESS

In March 1997, Gail Atwater was returning home after retrieving her two children (a boy and girl, ages three and five) from soccer practice.[13] She slowly cruised her neighborhood street in the small community of Lago Vista, Texas, driving the family pickup truck at fifteen miles per hour, in the hope of finding a cherished toy her son had dropped from the vehicle.[14] Police officer Barton Turek observed Atwater, together with her children in the front seat, and noticed that neither Atwater nor her children were wearing seat belts—in violation of Texas statutory law.[15] After detaining Atwater at the side of the road, Turek told her, "We've met before," referring to a prior incident when Turek mistakenly thought Atwater's son was not wearing a seat belt.[16] He then "yell[ed]" that Atwater was "going to jail"[17] and rejected her request to take the children to a friend's home nearby, despite the fact that they were "frightened, upset, and crying."[18] Upon learning that Atwater lacked her driver's license and insurance documentation because her purse had been stolen, a story he had "heard . . . two-hundred times,"[19] Turek handcuffed Atwater and transported her to the police station (ironically enough, without first attaching her seat belt).[20] Upon

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[13] *See* Ross E. Milloy, *Public Lives: For Seat-Belt Violator, a Jam, a Jail and Unmoved Justices*, N.Y. TIMES, Apr. 28, 2001, at A9.

[14] *Id.*

[15] *Atwater*, 532 U.S. at 323-24.

[16] *Id.* at 324 (citation omitted).

[17] *Id.*

[18] *Id.* Alerted by the commotion, a friend eventually arrived and prevented the children from being taken away by Turek, as he had threatened. *Id.* at 368-69 (O'Connor, J., dissenting).

[19] *Id.* at 324 (majority opinion) (citation omitted).

[20] *Id.* at 369 (O'Connor, J., dissenting) (citation omitted). A subsequent inventory of Atwater's truck revealed two tricycles, a bicycle, a cooler, a bag of charcoal, toys, groce-

arriving at the police station, Atwater was stripped of her personal possessions, subjected to a "mug shot," and placed in a booking cell for approximately one hour before she was brought before a magistrate and released on a $310 bond.[21] Atwater eventually pled no contest to the seat belt violation and paid a $50 fine.[22]

After city officials rebuffed her request that police receive better training and closer supervision, Atwater filed a civil rights suit under 42 U.S.C. § 1983, alleging the warrantless arrest for the fine-only seatbelt violation constituted an unreasonable seizure under the Fourth Amendment.[23] The trial court entered summary judgment in favor of the defendants, and a panel of the Fifth Circuit reversed.[24] On rehearing en banc, the Fifth Circuit again reversed.[25] The Supreme Court granted certiorari, agreeing to address whether "the Fourth Amendment, either by incorporating common-law restrictions on misdemeanor arrests or otherwise, limits police officers' authority to arrest without warrant for minor criminal offenses."[26]

By a five-four vote, the Court affirmed.[27] Justice Souter's opinion for the majority first examined early common law and framing era authorities on police power to execute warrantless arrests for offenses not involving a "breach of the peace."[28] The upshot of this history, he wrote, is that "the common-law commentators (as well as the sparsely reported cases) reached divergent conclusions" on such police authority.[29]

Justice Souter noted that while several "eminent authorities" supported the view that framing era warrantless arrest

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ries, and two pairs of children's shoes. *See* Linda Greenhouse, *Divided Justices Back Full Arrests on Minor Charges*, N.Y. TIMES, Apr. 25, 2001, at A1.

[21] *Atwater*, 532 U.S. at 324 (majority opinion).

[22] *Id.* Atwater's other charges, driving without a license and failing to provide proof of insurance, were dismissed. *Id.* In addition to the fine, Atwater paid $110 to retrieve her truck from the police impoundment lot. *See* Editorial, *An Erosion of Rights*, SALT LAKE TRIB., Apr. 30, 2001, at A10 (on file with author).

[23] *See* Milloy, *supra* note 13.

[24] Atwater v. City of Lago Vista, 165 F.3d 380 (5th Cir. 1999).

[25] Atwater v. City of Lago Vista, 195 F.3d 242 (5th Cir. 1999) (en banc).

[26] *Atwater*, 532 U.S. at 326.

[27] *Id.* at 322.

[28] *Id.* at 327.

[29] *Id.* at 328 & n.2.

power was quite limited, the record was insufficient to support a conclusion that Atwater's arrest violated the Fourth Amendment.[30] In particular, Justice Souter noted a 1631 English case upholding a warrantless arrest for dice play, later cited by several eighteenth-century commentators for the proposition that nonfelony arrest authority was not limited to breaches of the peace.[31] Early statutes, he explained, further undermined the view that officers were categorically barred from executing arrests for non-breach-of-the-peace misdemeanors.[32]

Justice Souter next evaluated whether subsequent authority or practice clarified the warrantless arrest authority of officers. On this count, he concluded, "the historical record as it has unfolded since the framing" showed an increasing receptiveness to warrantless arrests for non-breach-of-the-peace misdemeanors.[33] In support, Justice Souter quoted Michigan Law Professor Horace Wilgus, who observed in 1924:

> The states may, by statute, enlarge the common law right to arrest without a warrant, and have quite generally done so or authorized municipalities to do so, as for example, an officer may be authorized by statute or ordinance to arrest without a warrant for various misdemeanors and violations of ordinances, other than breaches of the peace, if committed in his presence.[34]

In the ensuing decades, Justice Souter observed, interest in broadened police arrest power continued largely unabated, such that by 2001 statutes in every American jurisdiction permitted officers some degree of warrantless arrest authority for non breach-of-the-peace misdemeanors.[35] As a result, Atwater's was "simply . . . not a case in which the claimant can point to 'a clear

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[30] *Id.* at 329.

[31] *Id.* at 331 (citing Holyday v. Oxenbridge, (1631) 79 Eng. Rep. 805 (K.B.)).

[32] *Id.* at 337 (noting, in particular, early English statutes permitting warrantless arrests of persons roaming the streets at night ("night-walkers")). The Court also noted statutes from the eighteenth century and before that targeted gamblers, peddlers, vagrants, and "negligent carriage drivers." *Id.* at 335.

[33] *Id.* at 340-45.

[34] *Id.* at 343 (quoting Horace L. Wilgus, *Arrest Without a Warrant*, 22 MICH. L. REV. 541, 550 & n.54 (1924)).

[35] *Id.* at 344-45, 355 app.

answer [that] existed in 1791 and has been generally adhered to by the traditions of our society ever since.'"[36] The Court therefore was obliged to "strike a current balance between individual and societal interests."[37]

To the *Atwater* majority, this balance weighed in favor of adopting a rule that, rather than turning on "sensitive, case-by-case determinations," could be easily and readily applied by police.[38] The majority rejected Atwater's suggestion that police arrest authority depend on whether (1) the underlying offense carried the threat of jail time or (2) it was "necessary for enforcement of the traffic laws," or to halt "[an] offense [that] would otherwise continue and pose a danger to others on the road."[39] Tying arrest authority to the gravity of the suspected offense was untenable because it would require difficult on-the-scene judgments about whether jail time was legally authorized.[40] Likewise, making the authority contingent on scofflaw or otherwise dangerous offenders was problematic.[41] Citing speeding as one possible problem area, Justice Souter asked, "[I]s it not fair to expect that the chronic speeder will speed again despite a citation in his pocket . . . ?"[42] Requiring police to divine whether behavior would persist would put them in an

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[36] *Id.* at 345 (alteration in original) (quoting County of Riverside v. McLaughlin, 500 U.S. 44, 60 (1991) (Scalia, J., dissenting)).

[37] *Id.* at 346 (citing Wyoming v. Houghton, 526 U.S. 295, 299-300 (1999) and Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 652-53 (1995)).

[38] In language echoing other recent opinions of the Court endorsing similar bright-line rules, Justice Souter characterized the need as follows:

> Often enough, the Fourth Amendment has to be applied on the spur (and in the heat) of the moment, and the object in implementing its command of reasonableness is to draw standards sufficiently clear and simple to be applied with a fair prospect of surviving judicial second-guessing months and years after an arrest or search is made. Courts attempting to strike a reasonable Fourth Amendment balance thus credit the government's side with an essential interest in readily administrable rules.

Id. at 347.

[39] *Id.* at 347, 349 (quoting Brief of Petitioners at 46, Atwater v. City of Lago Vista, 532 U.S 318 (2001) (No. 99-1408), 2000 WL 1299527).

[40] *Id.* at 348-49. Justice Souter elaborated: "It is not merely that we cannot expect every police officer to know the details of frequently complex penalty schemes, . . . but that the penalties for ostensibly identical conduct can vary on account of facts difficult (if not impossible) to know at the scene of arrest." *Id.* (internal citations omitted).

[41] *Id.* at 349.

[42] *Id.*

"almost impossible spot," and "guarantee increased litigation over many of the arrests that would occur."[43] In the end, Justice Souter concluded that having the constitutionality of an arrest hinge on such vicissitudes would create among police a "systemic disincentive to arrest":

> An officer not quite sure that the drugs weighed enough to warrant jail time or not quite certain about a suspect's risk of flight would not arrest, even though it could perfectly well turn out that, in fact, the offense called for incarceration and the defendant was long gone on the day of the trial. Multiplied many times over, the costs to society of such underenforcement could easily outweigh the costs to defendants of being needlessly arrested and booked.[44]

Finally, Justice Souter questioned whether warrantless misdemeanor arrests ultimately "need constitutional attention."[45] For one thing, he reasoned, the Court's prior decisions establish that a magistrate must review all warrantless arrests within forty-eight hours to ensure that probable cause supports the detention.[46] Constitutional protection is also afforded, on a case-by-case basis, to guard against any arrest (whether felony or misdemeanor) that is "conducted in an extraordinary manner, unusually harmful to [the citizen's] privacy or even physical interests."[47] Furthermore, legislatures in several jurisdictions had expressly limited police authority to execute warrantless arrests for minor offenses, an alternative Justice Souter deemed preferable to a broad constitutional rule.[48] Statutory limits were

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[43] *Id.* at 350. Justice Souter added:

> It is no answer that the police routinely make judgments on grounds like risk of immediate repetition; they surely do and should. But there is a world of difference between making that judgment in choosing between the discretionary leniency of a summons in place of a clearly lawful arrest, and making the same judgment when the question is the lawfulness of the warrantless arrest itself.

Id.

[44] *Id.* at 351.

[45] *Id.* at 351-52.

[46] *Id* at 352 (citing County of Riverside v. McLaughlin, 500 U.S. 44, 55-58 (1991)).

[47] *Id.* at 353 (quoting Whren v. United States, 517 U.S. 806, 818 (1996)).

[48] *Id.* at 352. Justice Souter offered that such an approach is preferable because "the statute can let the arrest power turn on any sort of practical consideration without having to subsume it under a broader principle." *Id.*

"natural" because it is in the interest of law enforcement "to limit petty-offense arrests, which carry costs that are simply too great to incur without good reason."[49]

Justice Souter concluded by expressing confidence that such statutory limits, "combined with the good sense (and, failing that, the political accountability) of most local lawmakers and law-enforcement officials," provided sufficient protection to citizens.[50] Indeed, the protection itself accounted for a "dearth of horribles demanding redress" in the form of "foolish, warrantless misdemeanor arrests."[51] While acknowledging that such arrests likely occurred on occasion, Justice Souter expressed confidence that "surely the country is not confronting anything like an epidemic of unnecessary minor-offense arrests."[52] Moreover, any concern that police might utilize their expansive authority to arrest, in lieu of citation, and thereby arbitrarily harass citizens, was "speculative" insofar as the record failed to indicate that such a potential "has ever ripened into a reality."[53]

In sum, the Court rejected Atwater's claim that her warrantless arrest and detention for a fine-only offense, as permitted by Texas statutory law,[54] violated the Fourth Amendment. The end result of *Atwater* is that "[i]f an officer has probable cause to believe that an individual has committed even a very minor criminal offense in his presence, he may, without violating the Fourth Amendment, arrest the offender."[55] The sole limit is that the act of physical arrest itself cannot be carried out in an "extraordinary manner, unusually harmful to [the citizen's] privacy or . . . physical interests."[56]

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[49] *Id.*

[50] *Id.* at 353.

[51] *Id.*

[52] *Id.*

[53] *Id.* at 354 & n.25.

[54] *See* TEX. CODE CRIM. PROC. ANN. art. 14.01(b) (Vernon 2005) (providing that a "peace officer may arrest an offender without a warrant for any offense committed in his presence or within his view"); TEX. TRANSP. CODE ANN. § 543.001 (Vernon 1999) (providing that a "peace officer may arrest without a warrant a person found committing a violation").

[55] *Atwater*, 532 U.S. at 354.

[56] *Id.* (quoting Whren v. United States, 517 U.S. 806, 818 (1996)).

Dissenting, Justice O'Connor, joined by Justices Ginsburg, Breyer, and Stevens, criticized the majority for affording "constitutional carte blanche" to officers to arrest for any offense, no matter how insignificant, solely on the basis of probable cause.[57] Justice O'Connor noted that the common law and historical record on minor-offense warrantless arrest authority was somewhat ambiguous,[58] but emphasized that prior statements by members of the Court gainsaid such authority.[59] Moreover, while the Court twenty-five years before in *Watson v. United States* had held that public warrantless arrests for felonies were justified solely on the basis of probable cause, there the historical record was far clearer and the state interest in immediate arrest far greater.[60] Finally, while the Court's 1996 decision in *Whren v. United States* approved of probable cause-based warrantless stops of motorists regardless of the subjective (perhaps pretextual) motivation of police, Atwater had been subject to a full custodial arrest.[61] "Justifying a full [custodial] arrest by the same quantum of evidence that justifies a traffic stop—even though the offender cannot ultimately be imprisoned for her conduct—defies any sense of proportionality and is in serious

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[57] *Id.* at 366 (O'Connor, J., dissenting).

[58] *Id.* at 362-63 (stating that the "Court's thorough exegesis makes it abundantly clear that warrantless misdemeanor arrests were not the subject of a clear and consistently applied rule at common law"). To scholars, most notably Professor Tom Davies, the framing era record is not so ambiguous, quite clearly evincing the limited warrantless arrest authority of law enforcement. *See* Thomas Y. Davies, *The Fictional Character of Law-and-Order Originalism: A Case Study of the Distortions and Evasions of Framing-Era Arrest Doctrine in* Atwater v. Lago Vista, 37 WAKE FOREST L. REV. 239 (2002).

[59] *Atwater*, 532 U.S. at 362 (O'Connor, J., dissenting) (citing Gustafson v. Florida, 414 U.S. 260, 266-67 (1973) (Stewart, J., concurring)); United States v. Robinson, 414 U.S. 218, 238 n.2 (1973) (Powell, J., concurring)). The majority's exclusive probable cause-based standard also conflicted with several of the Court's prior decisions linking the reasonableness of police seizures to the gravity of the offense involved. *See, e.g.*, Illinois v. McArthur, 531 U.S. 326, 336 (2001) (upholding seizure of resident because offense was "jailable"); Welsh v. Wisconsin, 466 U.S. 740, 754 (1984) (invalidating in-home warrantless arrest because offense was "nonjailable").

[60] *Atwater,* 532 U.S. at 362 (O'Connor, J., dissenting) (citing Watson v. United States, 423 U.S. 411 (1976)).

[61] *Id.* at 363 (noting that "[t]here are significant qualitative differences between a traffic stop and a full custodial arrest.").

tension with the Fourth Amendment's proscription of unreasonable seizures."[62]

Given the perceived ambiguous nature of the historical and precedential record, Justice O'Connor then engaged in balancing analysis, much like the majority. Rather than deferring to the avowed administrative benefits of a bright-line rule in evaluating reasonableness, however, Justice O'Connor expressed alarm over the ramifications of affording police unfettered discretionary authority to arrest for minor offenses. She first catalogued the major personal consequences of custodial arrests, including detention in a holding facility for up to forty-eight hours without judicial certification that the arrest was supported by probable cause;[63] the embarrassment and potential danger attending detention;[64] and the social stigma associated with having an arrest record.[65] She then highlighted the range of critically important investigatory powers tied to the occurrence of lawful arrests, such as the automatic right to search of the body and possessions of arrestees,[66] and the passenger compartment and any containers therein if the arrestee is driving a car.[67]

In order to justify such a "severe intrusion on an individual's liberty," Justice O'Connor reasoned, the governmental need must be substantial.[68] However, in the context of fine-only offenses, this need was manifestly modest and sufficiently served by the less onerous alternative of a citation. Given the availability of citations, Justice O'Connor reasoned, it betrayed reasonableness to endorse a bright-line rule that "deems a full custodial arrest to be reasonable in every circumstance" solely because the officer had probable cause to believe that a violation occurred.[69] Such an approach defied the Fourth Amendment

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[62] *Id.* at 364.

[63] *Id.* (citing County of Riverside v. McLaughlin, 500 U.S. 44 (1991)).

[64] *Id.* (citing Rosazza & Cook, *Jail Intake: Managing a Critical Function-Part One: Resources*, 13 AM. JAILS 35 (Mar./Apr. 1999)).

[65] *Atwater*, 532 U.S. at 364-65 (O'Connor, J., dissenting) (citing Paul v. Davis, 424 U.S. 693 (1976)).

[66] *Id.* at 364 (citing United States v. Robinson, 414 U.S. 218 (1973)).

[67] *Id.* (citing New York v. Belton, 453 U.S. 454 (1981)).

[68] *Id.* at 365.

[69] *Id.*

requirement that a police action be a "reasonable and proportional response to the circumstances of the offense," instead giving police "unfettered discretion" to execute custodial arrests "without articulating a single reason why such action is appropriate."[70]

In place of the majority's bright-line rule, Justice O'Connor advocated a case-by-case constitutional analysis modeled on *Terry v. Ohio*: when an officer has probable cause to believe that a fine-only offense has been committed, the officer "should issue a citation unless the officer is 'able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant [the additional] intrusion' of a full custodial arrest."[71] To Justice O'Connor, such a rule would be only modestly less clear and bright than that imposed by the majority, in that it would merely require "a legitimate reason for the decision to escalate the seizure into a full scale custodial arrest."[72] Furthermore, whatever the option lacked in categorical quality and administrability, it compensated for "in fidelity to the Fourth Amendment's command of reasonableness and sensitivity to the competing values protected by that Amendment."[73] As for the majority's concern over purported "systematic disincentives" associated with potential civil rights actions for false arrest, Justice O'Connor observed that qualified immunity largely served to insulate against the threat of actionable civil rights claims, and, at any rate, to the extent arrest disincentives were operative, they did not free the Court to "ignore the central [reasonableness] command of the Fourth Amendment."[74]

Applying her *Terry*-based test, Justice O'Connor concluded that neither "law nor reason" supported Turek's decision to arrest Atwater.[75] Atwater, a mother of two who had lived in the area for sixteen years, and whose only previous violation—failing to signal a lane change while driving—occurred ten years

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[70] *Atwater*, 532 U.S. at 372 (O'Connor, J., dissenting).
[71] *Id.* at 366 (alteration in original) (quoting Terry v. Ohio, 392 U.S. 1, 21 (1968)).
[72] *Id.*
[73] *Id.*
[74] *Id.* at 368.
[75] *Id.*

earlier, immediately accepted responsibility and apologized to Turek for her misbehavior.[76] It was thus likely that she thereafter would have complied with the seat belt law, and be available for a court appearance if necessary, making a citation a tenable and less restrictive option.[77] Justice O'Conner further noted that custodial arrest also failed to serve the interests of Atwater's two young children.[78] Turek's decision to arrest Atwater traumatized the children, leaving them distraught and fearful of police.[79] Instead of serving as a lesson in legal responsibility, as would be achieved by a citation, the arrest "taught the children an entirely different lesson: that the bad person could just as easily be the policeman as it could be the most horrible person they could imagine."[80] Justice O'Connor added that Turek's actions were "disproportionate" to Atwater's wrongdoing and that "[t]he majority's assessment that 'Atwater's claim to live free of pointless indignity and confinement clearly outweighs anything the City can raise against it specific to her case,' is quite correct. In my view, the Fourth Amendment inquiry ends there."[81]

Finally, Justice O'Connor turned her sights to the broader implications of the majority's bright-line rule. While governments surely should be free to enact public welfare-related laws punishable only by fine,[82] providing police categorical authority to arrest for their violation carried "grave potential for abuse," particularly because the Court's prior decision in *Whren v. United States* rendered constitutionally irrelevant the subjective motivations of police.[83] "After [the majority's decision]," O'Connor observed, "the arsenal available to any officer extends to a full arrest and the searches permissible concomitant to that arrest."[84] To Justice O'Connor, precisely because the subjective motivations of police cannot now be considered, the Court must

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[76] *Id.* at 369-70.
[77] *Id.* at 370.
[78] *Id.*
[79] *Id.*
[80] *Id.* (internal quotations omitted).
[81] *Id.* at 371 (quoting *Atwater*, 532 U.S. at 347 (majority opinion)).
[82] *Id.* at 371-72.
[83] *Id.* at 372 (citing Whren v. United States, 517 U.S. 806, 813 (1996)).
[84] *Id.*

"vigilantly ensure" that police behaviors—"which are properly within our reach—comport with the Fourth Amendment's guarantee of reasonableness."[85]

II. THE "EPIDEMIC"

Before considering the jurisprudential and practical effects of *Atwater*, it is important to discuss two empirical matters that undergird the majority's decision and were rightly disputed by Justice O'Connor. First, the majority downplayed the need for constitutional regulation of warrantless arrest authority out of a belief that police naturally lack incentive to arrest for minor violations because they "carry costs too great to incur without good reason."[86] As Justice O'Connor suggested, however, the majority's sense of police motivation was at best naïve.[87] Because arrests serve as triggering events justifying an array of attendant police powers, most notably searches incident to arrest,[88] police have strong incentive to arrest for minor offenses in the hope of securing evidence of more serious crimes (typically, illegal drug or weapon possession).

Second, the majority insisted that constitutional oversight was not needed because the nation was "not confronting anything like an epidemic of unnecessary minor-offense arrests."[89] In support, the majority pointed out that Atwater's counsel at oral argument was able to identify only one other instance "of comparably foolish, warrantless misdemeanor arrests,"[90] serving to confirm that "there simply is no evidence of widespread abuse of minor-offense arrest authority," and that counsel's posited "'potential for abuse'" had not "ripened into a reality."[91]

Again, Justice O'Connor justly disputed the majority's assertions. As a threshold matter, she questioned the majority's fixation on the purported "relatively small number of published

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[85] *Id.*
[86] *Id.* at 321 (majority opinion).
[87] *Id.* at 372 (O'Connor, J., dissenting).
[88] *Atwater*, 532 U.S. at 353 (majority opinion).
[89] *Id.*
[90] *Id.*
[91] *Id.* at 372 (O'Connor, J., dissenting).

cases," noting that it "proves little and should provide little solace."[92] It has long been known that paucity of published (and for that matter unpublished) case law is a poor barometer of the actual existence of events.[93] This is perhaps especially so with street-level searches and seizures based on minor offenses, a context particularly conducive to "invisible" practices,[94] due to the effort and expense associated with constitutional litigation[95] and the natural disincentive to pursue a claim when no long-term deprivation of liberty is at stake.[96] Moreover, minor-offense arrest data, as noted by Atwater's counsel in an unsuccessful petition for rehearing, very likely significantly understate the frequency of such arrests, for two chief reasons.[97] First, minor offense arrests are often not recorded as such if a search, conditioned upon the arrest, resulted in discovery of contraband or evidence of a more serious crime.[98] Second, the data fail to reflect instances when police "unarrest" individuals—that is,

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[92] *Id.*

[93] *Id.* For an early yet still apt recognition of this, see Brinegar v. United States, 338 U.S. 160, 181 (1949) (Jackson, J., dissenting) (noting that "invasion of the personal liberty of the innocent too often finds no practical redress," and that "[t]here may be, and I am convinced that there are, many unlawful searches . . . of innocent people which turn up nothing incriminating..."). *See also, e.g.,* Rawlings v. Kentucky, 448 U.S. 98, 121 (1980) (Marshall, J., dissenting) ("Because we are called on to decide whether evidence should be excluded only when a search has been 'successful,' it is easy to forget that the standards we announce determine what government conduct is reasonable in searches and seizures directed at persons who turn out to be innocent as well as those who are guilty. I continue to believe that ungrudging application of the Fourth Amendment is indispensable to preserving the liberties of a democratic society.").

[94] *See, e.g.,* Caleb Foote, *Law and Police Practice: Safeguards in the Law of Arrest*, 52 NW. U. L. REV. 16, 20-21 (1957); Jerome Hall, *The Law of Arrest in Relation to Contemporary Social Problems*, 3 U. CHI. L. REV. 345, 359-62 (1936).

[95] Gail Atwater qualified as a notable exception in this regard. She sued solely to vindicate what she saw as her Fourth Amendment right, not to suppress evidence uncovered by police in a search incident to arrest. Atwater and her husband, a physician, sold their home and incurred legal costs in excess of $100,000. Atwater told one reporter: "If someone like me, a soccer mom, can be humiliated and handcuffed in front of her children, what happens to the poor migrant worker or minority when they're stopped?" Milloy, *supra* note 13, at A9.

[96] *See* Brinegar v. United States, 338 U.S. 160, 181 (1949) (Jackson, J., dissenting) (noting that "invasion of the personal liberty of the innocent too often finds no practical redress. There may be, and I am convinced that there are, many unlawful searches . . . of innocent people which turn up nothing incriminating . . . .").

[97] Petition for Rehearing at 4-5, *Atwater*, 532 U.S. 318 (No. 99-1408) (providing data on traffic-related arrests in several states).

[98] *Id.*

police conduct a search ostensibly based on an arrest for a minor offense, find no evidence or contraband resulting in a more serious prosecution, and release an individual with a mere citation or warning.[99]

In any event, even if one were to accept the majority's curious notion that a constitutional violation is acceptable merely because it rarely occurs,[100] the majority's empirical premise was clearly incorrect. Ample evidence existed at the time of *Atwater* of a profusion of "very minor offense" arrests, triggering incident searches resulting in more serious criminal prosecutions. For instance, state and lower federal courts condoned warrantless arrests, and searches incident thereto, for myriad minor auto and non-auto-related offenses, including:

> illegal parking;[101] littering;[102] riding a bicycle on a sidewalk[103] or without a headlight;[104] civil contempt (based on a civil bench warrant);[105] juvenile curfew violation;[106] truancy;[107] speeding;[108] driving with a broken taillight;[109] possessing drug paraphernalia;[110] violating an alcohol open container law;[111] public drinking;[112] underage possession of alcohol;[113] "pedestrian interfe-

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[99] *Id.*

[100] Indeed, the rarity of minor offense arrests, if accurate, itself can be said to heighten their Fourth Amendment unreasonableness. *Cf.* Coker v. Georgia, 433 U.S. 584, 596-97 (1977) (citing paucity of jury death verdicts imposed on defendants convicted of rape as evidence supporting the view that the death penalty in such situations violates the Eighth Amendment).

[101] Williams v. State, 726 S.W.2d 99 (Tex. Crim. App. 1986).

[102] United States v. Herring, 35 F. Supp. 2d 1253 (D. Or. 1999); State v. Sparks, 422 S.E.2d 293 (Ga. Ct. App. 1992); State v. Ranson, 511 N.W.2d 97 (Neb. 1994); People v. Whitted, 718 N.Y.S.2d 162 (City Ct. 2000).

[103] United States v. McFadden, 238 F.3d 198 (2d Cir. 2001) (applying New York law).

[104] United States v. Bell, 54 F.3d 502 (8th Cir. 1995) (applying Iowa law).

[105] People v. Allibalogun, 727 N.E.2d 633 (Ill. App. Ct. 2000).

[106] *In re* Charles C., 90 Cal. Rptr. 2d 430 (Ct. App. 1999); *In re* J.M., 995 S.W.2d 838 (Tex. App. 1999).

[107] *In re* Humberto O., 95 Cal. Rptr. 2d 248 (Ct. App. 2000); State *ex rel.* R.D., 749 So. 2d 802 (La. Ct. App. 1999).

[108] United States v. Lugo, 170 F.3d 996 (10th Cir. 1999) (applying Utah law); Kearse v. State, 986 S.W.2d 423 (Ark. Ct. App. 1999).

[109] State v. Hehman, 544 P.2d 1257 (Wash. Ct. App. 1976).

[110] State v. Thompson, 104 Wash. App. 1008 (Wash. Ct. App. 2001).

[111] People v. Pantusco, 484 N.Y.S.2d 321 (App. Div. 1985); State v. Pallone, 613 N.W.2d 568 (Wis. 2000).

[112] State v. Thompson, 536 So. 2d 388 (Fla. Dist. Ct. App. 1989).

rence";[114] urinating in public;[115] and possessing a suspended driver's license while operating a bicycle (on reasoning that the document permitted misidentification).[116]

Since *Atwater*, courts have cited the majority's decision to uphold arrests (and incidental searches) for a litany of minor offenses, again very often based on municipal ordinances,[117] including:

walking in a roadway;[118] possessing an open container of alcohol in public;[119] driving with an expired vehicle registration sticker;[120] making an illegal turn while driving;[121] jaywalking;[122] driving a car with a non-working headlight;[123] driving a car with a hole in the car's license plate;[124] riding a bicycle the wrong direction on a residential street[125] or without a headlight;[126] public urination;[127] driving a bike against traffic;[128]

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[113] Commonwealth v. Moscat, 731 N.E.2d 544 (Mass. App. Ct. 2000).

[114] State v. Greene, 983 P.2d 1190 (Wash. Ct. App. 1999).

[115] Commonwealth v. Williams, 568 A.2d 1281 (Pa. Super. Ct. 1990); McConnell v. State, No. 14-99-00887-CR, 2001 WL 8344 (Tex. App. Jan. 4, 2001).

[116] Caraballo v. State, 753 So. 2d 695 (Fla. Dist. Ct. App. 2000). For examples of pre-*Atwater* judicial invalidation of warrantless minor offense arrests, as constitutionally unreasonable, see Barnett v. United States, 525 A.2d 197 (D.C. 1987) (jaywalking); Thomas v. State, 614 So. 2d 468 (Fla. 1993) (riding a bicycle without a bell); State v. Carver, 577 N.W.2d 245 (Minn. Ct. App. 1998) (speeding).

[117] For a discussion of the significant power of municipal governments to enact laws enforceable by state, local and federal officers, see Wayne A. Logan, *The Shadow Criminal Law of Municipal Governance*, 62 OHIO ST. L.J. 1409 (2001).

[118] Collins v. State, No. 14-00-00814-CR, 2001 WL 664644 (Tex. Ct. App. June 14, 2001).

[119] People v. Lopez, No. HO24173, 2003 WL 21942954 (Cal. Ct. App. Aug. 14, 2003); State v. Roche, 928 So. 2d 761 (La. Ct. App. 2006).

[120] Nicholson v. State, No. 05-00-01401-CR, 2001 WL 515919 (Tex. Ct. App. May 16, 2001).

[121] People v. Fennell, No. B144396, 2001 WL 1190768 (Cal. Ct. App. Oct. 1, 2001).

[122] United States v. Pratt, 355 F.3d 1119 (8th Cir. 2004) (applying Missouri law); State v. Barros, 48 P.3d 584 (Haw. 2002); State v. Brown, No. 18972, 2001 WL 1657828 (Ohio Ct. App. Dec. 28, 2001).

[123] State v. Wilkenson, 769 N.E.2d 430 (Ohio Ct. Com. Pl. 2001).

[124] People v. Lambert, No. D052435, 2009 WL 1091704 (Cal. Ct. App. 2009).

[125] People v. McKay, 41 P.3d 59 (Cal. 2002).

[126] Brown v. State, No. 13-05-243-CR, 2006 WL 2025145 (Tex. App., July 20, 2006).

[127] State v. Mercante, 836 So. 2d 596 (La. Ct. App. 2002).

[128] People v. Bybee, No. B171855, 2004 WL 1689782 (Cal. Ct. App. July 29, 2004).

and violating a city ordinance for remaining in a public park after hours.[129]

At the same time, courts have invoked *Atwater* to bar civil rights actions based on arrests for very minor offenses, without searches, as condoned in *Atwater,*[130] which in conjunction with data showing that most misdemeanor arrests do not result in prosecution,[131] raises serious question whether police rarely resort to "unnecessary" minor offense arrests.

The judicial and empirical record thus readily contradicts the presumption that afforded constitutional solace to the *Atwater* majority. In a case decided shortly after *Atwater* in the 2000-2001 Term, involving a car inventory stemming from an arrest for several minor vehicle-related offenses, Justice O'Connor and the three other *Atwater* dissenters concurred on

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[129] Tanberg v. Sholtis, 401 F.3d 1151 (10th Cir. 2005) (applying New Mexico law); Hudson v. State, No. CACR00-1013, 2001 WL 541069 (Ark. Ct. App. May 23, 2001).

[130] *See, e.g.*, Thomas v. City of Peoria, 580 F.3d 633 (7th Cir. 2009) (unpaid parking tickets); Lorenzo v. City of Tampa, 259 Fed. App'x 239 (11th Cir. 2007) (illegally distributing handbills); Williams v. Rodriguez, 509 F.3d 392 (7th Cir. 2007) (double parking vehicle); Tanberg v. Sholtis, 401 F.3d 1151 (10th Cir. 2005) (being in a municipal park after closing); Chortek v. City of Milwaukee, 356 F.3d 740 (7th Cir. 2004) (illegally selling tickets); Lee v. Ferraro, 284 F.3d 1188 (11th Cir. 2002) (noise ordinance); Lowe v. Spears, No. 3:06-0647, 2009 WL 1393860 (S.D. W. Va. May 15, 2009) (parking violation); Revely v. City of Huntington, No. 3:07-0648, 2009 WL 1097972 (S.D. W. Va. Apr. 23, 2009) (failure to stop a car parallel with a stop sign); Hitto v. City of Murphy, No. 4:08-cv-221, 2009 WL 801772 (E.D. Tex. Mar. 24, 2009) (running a stop sign while driving a bicycle); Shipp v. Bucher, No. 8:07-cv-440-T-17TBM, 2009 WL 179668 (M.D. Fla. Jan. 26, 2009) (public disposal of lighted material (cigarette)); Wasserman v. Rodacker, No. 06-1005 (RWR), 2007 WL 2071649 (D.D.C. July 18, 2007) (walking dogs without a leash); Sands v. City of New York, No. CV 04 5275 BMC CLP, 2006 WL 2850613 (E.D.N.Y. Oct. 3, 2006) (littering); Holloman v. City of Myrtle Beach, No. 4:04-1868, 2006 WL 4869353 (D.S.C. June 8, 2006) (following a police car too closely (1.5 lengths)); Bennett v. Booth, No. Civ. A. 3:04-1322, 2005 WL 2211371 (S.D. W. Va. Sept. 9, 2005) (unlawful display of a "Friends of Police" emblem on car).

[131] *See* Surell Brady, *Arrests Without Prosecution and the Fourth Amendment*, 59 MD. L. REV. 1, 46 (2000) (discussing data showing that majority of state misdemeanor arrests do not ultimately result in prosecution). Aggregate arrest data (while likely understated, for reasons noted) indicate the high frequency of arrests based on minor offenses. *See* SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS ONLINE tbls. 4.1, 4.7 (Ann L. Pastore & Kathleen Maguire, eds., 2007), http://www.albany.edu/sourcebook/tost_4.html (noting millions of minor offense-based arrests, exclusive of non-DUI traffic violations); K. Babe Howell, *Broken Lives from Broken Windows: The Hidden Costs of Aggressive Order-Maintenance Policing*, 33 N.Y.U. REV. L. & SOC. CHANGE 271, 280-90 (2009) (examining huge volume of minor offense arrests in New York City).

stare decisis grounds,[132] but expressed "hope" that the majority would reconsider its holding in *Atwater* "if experience demonstrates 'anything like an epidemic of unnecessary minor-offense arrests.'"[133] Unfortunately, this reconsideration, based on what Justice Brandeis called the "lessons of experience," has not been forthcoming.[134] As a result, with probable cause serving as the sine qua non of Fourth Amendment reasonableness, both visible and invisible arrests—and searches—have occurred without meaningful constitutional limit.[135] This expanded arrest power has major personal consequences for individuals, as noted by Justice O'Connor, and has assumed added significance with recent initiatives to extract and retain DNA samples from all arrestees, not solely from persons convicted of crimes.[136]

Finally, Justice O'Connor's insistence on the need for a constitutional limit, rather than relying on what the majority considered the lack of police incentive to arrest and the "good sense (and, failing that, the political accountability) of most local lawmakers and law-enforcement officials,"[137] has been validated by subsequent events. Faith that the political process can curb undue police practices, voiced again by the Court in *Herring v. United States*,[138] has proven unjustified.[139] Notably, in the wake

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[132] Arkansas v. Sullivan, 532 U.S. 769, 772-73 (2001) (applying Arkansas law).

[133] *Id.* at 773 (quoting Atwater v. City of Lago Vista, 532 U.S. 318, 353 (2001)).

[134] Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 407-08 (1932) (Brandeis, J., dissenting).

[135] The Court's recent decision in *Arizona v. Gant*, 129 S. Ct. 1710 (2009) holds some promise of mitigating the breadth of search incident to arrest authority, at least relative to auto-related stops. In *Gant*, the Court held that an auto interior search is justified only when "the arrestee is within reaching distance of the passenger compartment at the time of the search or it is reasonable to believe the vehicle contains evidence of the offense of arrest." *Id.* at 1723. The *Gant* majority stated that "[i]n many cases, as when a recent occupant is arrested for a traffic violation, there will be no reasonable basis to believe the vehicle contains relevant evidence." *Id.* at 1719. The "reasonable basis to believe" standard, however, would appear to be a lesser quantum than probable cause, likely serving to limit the effect of the Court's statement.

[136] *See* Solomon Moore, *F.B.I. and States Vastly Expanding Databases of DNA*, N.Y. TIMES, Apr. 19, 2009, at A1.

[137] *Atwater*, 532 U.S. at 353 (O'Connor, J., dissenting).

[138] 129 S. Ct. 695, 704 (2009). The Court's view is strikingly reminiscent of that expressed in *Wolf v. Colorado*, 338 U.S. 25, 31 (1949), where Justice Frankfurter opined that "the internal discipline of the police, under the eyes of an alert public opinion" would obviate the need for a judicially imposed constitutional limit. However, the view

of *Atwater,* Texas itself considered enacting a statutory limit on the warrantless arrest authority of police with regard to minor motor vehicle offenses, emulating the laws in several jurisdictions approvingly cited by the majority.[140] However, the bill failed to secure gubernatorial approval.[141] With the strong support of law enforcement groups, Governor Rick Perry stated that "[p]eace officers should retain their existing authority to use their discretion to arrest for a traffic violation."[142]

Moreover, the targets of such discretionary exercises of police authority will not only resemble self-described soccer moms such as Gail Atwater, who was very nearly relegated to the poor house as a result of her litigation.[143] Rather, what Justice O'Connor termed "constitutional carte blanche"[144] extends to all individuals suspected of committing minor offenses, a domain in which police enjoy maximum latitude to exercise discretionary arrest authority.[145] In this camp one will surely find the politically disempowered, disproportionately persons of color, whose voices are either muted or not heeded by elected officials, or quite possibly, out-of-state visitors whom the police can target with political impunity.[146]

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was gainsaid twelve years later in *Mapp v. Ohio*, 367 U.S. 643, 654-55 (1961), when the Court felt the need to impose the exclusionary sanction on the states.

[139] *Cf.* Louis D. Bilionis, *Process, the Constitution, and Substantive Criminal Law*, 96 MICH. L. REV. 1269, 1329 (1998) (noting "breakdowns at the legislative and the discretionary institutional level that are mutually reinforcing").

[140] *Atwater*, 532 U.S. at 352 (citing examples and noting that "[i]t is of course easier to devise a minor-offense limitation by statue than to derive one through the Constitution").

[141] Michele Deitch, *Veto Risks Texans' Civil Rights*, DALLAS MORNING NEWS, July 1, 2001, at 5J.

[142] Wayne A. Logan, *Street Legal: The Court Affords Police Constitutional Carte Blanche*, 77 IND. L.J. 419, 448 (2002) (citation omitted).

[143] *See* Milloy, *supra* note 13.

[144] *Atwater*, 532 U.S. at 366 (O'Connor, J., dissenting).

[145] *See, e.g.,* James Walsh & Dan Browning, *Presumed Guilty Until Proved Innocent*, STARTRIBUNE (Minneapolis), July 23, 2000, at 1A (noting significantly higher warrantless arrest rates for African-Americans with regard to a broad array of minor offenses); *see also* David Cole, *Foreword: Discretion and Discrimination Reconsidered: A Response to the New Criminal Justice Scholarship*, 87 GEO. L.J. 1059, 1083 (1999) ("The problem with discretionary authority . . . is that discretion permits law enforcement to target those whose complaints are least likely to be heard by the rest of the community.").

[146] Such a prospect was noted by Justice Stevens in *Knowles v. Iowa*, 525 U.S. 113 (1998), where the Court invalidated a police officer's search incident to issuance of a citation. *See* Transcript of Oral Argument at 49, Knowles v. Iowa, 525 U.S. 113 (No. 97-

Justice O'Connor's insistence on a constitutional limit is further justified given the Court's recent decision in *Virginia v. Moore*.[147] Making ample use of *Atwater* as precedent, the *Moore* Court held that state statutory limits on police discretionary arrest authority for minor offenses were immaterial for Fourth Amendment purposes.[148] In *Moore*, police arrested a motorist in flagrant defiance of a Virginia law that limited custodial arrests to specified instances, such as when the violator refuses to discontinue the offense.[149] The arresting officer stated that executing an arrest instead of issuing a citation for driving with a suspended license was his "prerogative."[150] He thereafter conducted a search and discovered crack cocaine in Moore's vehicle, which ultimately led to Moore's conviction for possession of cocaine with intent to distribute.[151] Invoking *Atwater*'s "probable cause standard" and re-asserting the absence of any "epidemic" of "horribles" that compels redress, the *Moore* Court stated:

> [A]n arrest based on probable cause serves interests that have long been seen as sufficient to justify the seizure . . . . A State is free to prefer one search-and-seizure policy among the range of constitutionally permissible options, but its choice of a more restrictive option does not render the less restrictive ones unreasonable, and hence unconstitutional.[152]

With *Moore*, the Court thus dashed the lingering hope of direct legislative redress for the exercise of unreasonable discretionary arrest authority of police, using *Atwater*'s substitute of probable cause for reasonableness as constitutional justification.[153] As *Moore* and *Atwater* in tandem make clear, constitu-

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7597), 1998 WL 781827 (observing that Iowa police might save the strategy of arresting rather than ticketing "for out-of-state motorists").

[147] 128 S. Ct. 1598 (2008).

[148] *Id.* at 1604-07; *see also id.* at 1609 (Ginsburg, J., concurring).

[149] *Id.* at 1602.

[150] Joint Appendix at 15, *Moore*, 128 S. Ct. 1598 (2007) (No. 06-1082).

[151] *Moore*, 128 S. Ct. at 1602.

[152] *Id.* at 1606.

[153] *See id.* at 1604 (noting that "when an officer has probable cause to believe a person committed even a minor crime in his presence, the balancing of private and public interests is not in doubt. . . . The arrest is constitutionally reasonable."); *see also id.* at 1608 ("When officers have probable cause to believe that a person has committed a crime in their presence, the Fourth Amendment permits them to make an arrest, and to

tional reasonableness turns solely on probable cause that a substantive law was violated, irrespective of whether a jurisdiction procedurally authorizes (*Atwater*) or prohibits (*Moore*) arrest for its violation. As a result, warrantless arrests for minor offenses have continued unabated.[154]

Ultimately, the *Atwater* majority's understanding of both police motivation and the incidence of minor offense arrests stems from a basic confidence in the equitable use by police of their discretionary authority. As Ronald Dworkin once noted, however, "[d]iscretion, like the hole in a doughnut, does not exist except as an area left open by a surrounding belt of restriction."[155] With *Atwater*, this "belt," long supported by judicial sensitivity to police abuses of discretionary authority[156] and decades of research,[157] has essentially ceased to exist.

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search the suspect in order to safeguard evidence and ensure their own safety."). *Atwater*—decided in 2001—served as the anchor of the *Moore* Court's reference to the "long line" of cases equating probable cause with constitutional reasonableness, the historical verity of which was justly questioned by Justice Ginsburg in her *Moore* concurrence. *Moore*, 128 S. Ct. at 1608-09 (Ginsburg, J., concurring).

[154] In the future, such arrests may not be limited to non-breach-of-the-peace offenses occurring "in the presence" of arresting officers. The *Atwater* majority expressly disclaimed the need to address whether the accepted common law requirement enjoyed constitutional status, seeing no need to "speculate" on the question, presumably because Turek witnessed Atwater's seatbelt violation. Atwater v. City of Lago Vista, 532 U.S. 318, 340 n.11 (2001). However, the majority signaled its view that the requirement is not of Fourth Amendment stature, citing to a prior comment to this effect by Justice White. *Id.* (quoting Welsh v. Wisconsin, 466 U.S. 740, 756 (1984) (White, J., dissenting)).

[155] RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 31 (1977).

[156] Such concern was perhaps most famously evinced by Justice Robert Jackson's assertion that search and seizure authority should not be left only to "the officer engaged in the often competitive enterprise of ferreting out crime." United States v. Johnson, 333 U.S. 10, 14 (1948). For similar acknowledgements in later years see, for example, Coolidge v. New Hampshire, 403 U.S. 443, 449 (1971); Chapman v. United States, 365 U.S. 610, 614 (1961). *See also* Herbert L. Packer, *The Courts, The Police, and the Rest of Us*, 57 J. CRIM. L., CRIMINOLOGY & POLICE SCI. 238, 241 (1966) (observing that the judiciary was "unconvinced that the police regard the rights of the accused as anything but a nuisance and an impediment").

[157] *See, e.g.*, WAYNE R. LAFAVE, ARREST: THE DECISION TO TAKE A SUSPECT INTO CUSTODY (Frank J. Remington ed., 1965); *see also* ALLEN STEINBERG, THE TRANSFORMATION OF CRIMINAL JUSTICE, PHILADELPHIA 1800-1880, at 180-81 (1989) (quoting a local city judge, alarmed at the increasing resort by police to arrest for minor offenses, who demanded that they cease their "constant habit of arresting parties in order to search them.").

III. THE PERILS OF POSITIVIST POLICING

By equating probable cause with constitutional reasonableness, Justice O'Connor correctly observed, the *Atwater* majority freed police to invoke minor offenses as bases for arrest, permitting the widespread "'pointless indignity'" suffered by lawbreakers such as Gail Atwater[158] and the "grave potential for abuse" associated with unfettered discretionary arrest authority.[159] The myriad of substantive offenses today codified in state, federal, and local government codes, have become, in the wake of *Atwater*, tools for the exercise of discretionary police arrest authority. The Court itself has refused to regulate these tools, eschewing imposition of limits on possibly "exorbitant codes"[160] for purposes of police enforcement, and rejecting, as *Virginia v. Moore* established, any federal constitutional limiting effect of cognate state procedural limits on police arrest authority.[161]

Because police officers take oaths to enforce the law, the Court's insistence that their arrest authority be based on a suspected violation of positive law should come as no surprise. Indeed, as Justice O'Connor emphasized, governments clearly act within their rights when they legislate pursuant to their police power authority, including malum prohibitum offenses.[162] However, as she also noted, not all laws should be the same relative to police discretionary arrest authority. This part examines several important consequences of the *Atwater* majority's decision to make constitutional reasonableness turn on probable cause that an offense, no matter how menial, has occurred.

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[158] *Atwater*, 532 U.S. at 371 (O'Connor, J., dissenting).

[159] *Id.* at 372.

[160] Whren v. United States, 517 U.S. 806, 818 (1996). *See also* Safford Unified Sch. Dist. #1 v. Redding, 129 S. Ct. 2633, 2651 (2009) (Thomas, J., dissenting) (specifying a "basic principle of the Fourth Amendment: that law enforcement officials can enforce with the same vigor all rules and regulations irrespective of the perceived importance of any of those rules") (citing *Atwater*, 532 U.S. at 347).

[161] *See supra* notes 147-154 and accompanying text. For discussion of the risks associated with decoupling substantive laws from their accompanying procedural limits, see Wayne A. Logan, *Creating a "Hydra in Government": Federal Recourse to State Law in Crime Fighting*, 86 B.U. L. REV. 65, 74-75 (2006).

[162] *Atwater*, 532 U.S. at 371-72 (O'Connor, J., dissenting).

A. "Law in the Air"[163]

The Texas law at issue in *Atwater,* penalizing a motorist's failure to wear a seat belt—resulting in a fine—is representative of countless state, local, and federal laws targeting similar misconduct of a relatively non-serious nature.[164] In *Atwater*, only a single law was implicated. Three years later, in *Devenpeck v. Alford,*[165] the Court made clear that the greater the number of laws potentially at play, the greater the likelihood that an arrest will be deemed constitutionally valid.

In *Alford*, police arrested an individual because he was believed to be tape recording a traffic stop in violation of state privacy laws. After a determination that Alford's behavior was in actuality not illegal, the charges against him were dismissed.[166] Thereafter, prosecutors filed new legally actionable charges, based on the arresting officer's subsequent contention that probable cause existed at the time to support arrest for other offenses not initially identified by the arresting officer (e.g., impersonating a police officer).[167] The Court unanimously held the new grounds of arrest were constitutionally reasonable, even though not "closely related" to the alleged misconduct serving as the initial basis for arrest.[168] Probable cause that a legal violation occurred, "drawn from the facts known to the arresting officer," even if based on *ex post* legal extrapolations of the entire legal code, can thus constitutionally validate an arrest.[169] An officer's "subjective reason for making the arrest need not be the criminal offense as to which the known facts provide probable cause."[170] So long as probable cause exists that *some* offense occurred, an arrest is constitutionally reasonable, even if the legal

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[163] With a hat tip of course to Justice Cardozo who alternatively argued that "negligence in the air," absent proof of violation of a legal norm, will not suffice to create tort liability. *See* Palsgraf v. Long Island R.R., 162 N.E. 99, 99 (N.Y. 1928) (Cardozo, J.).

[164] *See supra* notes 101-130 and accompanying text.

[165] 543 U.S. 146 (2004).

[166] *Id.* at 149-51.

[167] *Id.* at 149-50.

[168] *Id.* at 155-56.

[169] *Id.* at 152. The court added, "[T]hose are lawfully arrested whom the facts known to the arresting officers give probable cause to arrest." *Id.* at 155.

[170] *Id.* at 153.

basis is not specified, or indeed, if the basis initially specified turns out to lack legal justification.

Atwater and *Alford,*[171] together with *Moore*'s disregard of procedural limits on police arrest authority, have empowered police to use any law, at any time, and any place,[172] to justify arrests, and hence searches.[173] Given the heavily regulated nature of modern society, especially relative to motor vehicles,[174]

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[171] For examples of recent decisions expressly combining *Alford* and *Atwater*, see Brown v. Fisher, 251 Fed. App'x. 527 (10th Cir. 2007) (applying Kansas law); Apodca v. City of Albuquerque, 443 F.3d 1286 (10th Cir. 2006) (applying New Mexico law); Tatum v. City of San Francisco, 441 F.3d 1090 (9th Cir. 2006) (applying California law); United States v. McNeill, 484 F.3d 301 (4th Cir. 2007) (applying Maryland law). For examples of earlier courts deploying *Atwater* to reach results later also authorized by *Alford,* see Williams v. Jaglowski, 269 F.3d 778 (7th Cir. 2001) (applying Illinois law); People v. Bybee, No. B171855, 2004 WL 1689782 (Cal. Ct. App. July 29, 2004).

It warrants mention that *Alford* potentially builds on language in *United States v. Leon*, 468 U.S. 897 (1984), which suggested that information possessed by other officers can augment and rehabilitate infirm probable cause assessments by arresting officers. *See id.* at 923 n.24 ("References to 'officer' throughout this opinion should not be read too narrowly. It is necessary to consider the objective reasonableness, not only of the officers who eventually executed a warrant, but also of the officers who originally obtained it or who provided information material to the probable-cause determination."); *see also* Whitely v. Warden, 401 U.S. 560 (1971) (recognizing the "collective knowledge" doctrine).

[172] *See, e.g.,* United States v. Turner, 553 F.3d 1337, 1345-46 (10th Cir. 2009) (applying Colorado law and, citing *Atwater* and *Moore*, holding that jurisdictional geographic limits on police arrest authority have no bearing on constitutionality of arrest).

[173] The Court's recent decision in *Arizona v. Gant*, 129 S. Ct. 1710 (2009), presents an interesting question vis-à-vis *Alford*. As noted earlier, the Court imposed new limits on police search incident to arrest authority, deeming an automobile search justified only when "the arrestee is within reaching distance of the passenger compartment at the time of the search or it is reasonable to believe the vehicle contains evidence of the *offense of arrest." Id.* at 1723 (emphasis added). *Alford*'s bearing on the latter consideration remains to be seen when, for example, the initial basis for arrest leads an officer to reasonably believe the car contains relevant evidence, but the substantive legal basis for the arrest itself (as in *Alford)* is later deemed invalid.

[174] *See* Wayne R. LaFave, *The "Routine Traffic Stop" from Start to Finish: Too Much "Routine," Not Enough Fourth Amendment*, 102 MICH. L. REV. 1843, 1853 (2004) (noting that "very few drivers can traverse any appreciable distance without violating some traffic regulation"). *Atwater*'s application in the auto context, as Professor Dave Moran has astutely observed, can function to moot the Court's case law limiting police roadblocks. *See* David A. Moran, *The New Fourth Amendment Vehicle Doctrine: Stop and Search Any Car at Any Time*, 47 VILL. L. REV. 815, 832 (2002) ("If an officer may stop any car she observes committing any traffic or equipment violation, arrest the motorist and search the car, there is no need to set up roadblocks. Indeed, it would obviously be much more efficient and productive for the police to single out 'suspicious' motorists, [and] stop and arrest them for trivial violations . . . .").

the power is manifestly far greater than that enjoyed by framing era police.[175]

B. "Could have Arrested" Authority

Atwater's positivist orientation has encouraged and fortified another feature of modern street-level policing : the "could have arrested" authority. The question of whether an actual arrest is necessary to justify an incidental search would appear to have been settled by several of the Court's prior decisions. In particular, in *Cupp v. Murphy*[176] the Court stated:

> Where there is no formal arrest, as in the case before us, a person might well be less hostile to the police and less likely to take conspicuous, immediate steps to destroy incriminating evidence on his person. Since he knows he is going to be released, he might likely be instead to be concerned with diverting attention away from himself.[177]

Similarly, the Court's unanimous 1998 decision in *Knowles v. Iowa*, prohibiting police from conducting searches incident to issuance of a citation, was clearly predicated on the occurrence of an actual arrest.[178] Even though Iowa law expressly authorized arrest (as in *Atwater*) for a speeding offense, the fact that the officer did not arrest Knowles—but rather merely issued a citation—rendered the ensuing search unconstitutional.[179] Tak-

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[175] As Professor Tom Davies has convincingly shown, during the framing era the *ex parte* warrantless arrest authority of police, such as it existed, was very limited. Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 MICH. L. REV. 547 (1999). The limited authority stemmed *inter alia* from the requirement that an offense have been committed "in fact." *Id.* at 651. "[The] common law required that arrest or search warrants had to be based on an allegation of an offense or theft 'in fact' as well as 'probable cause of suspicion' as to a particular person to be arrested or place to be searched." *Id.* at 703; *see also* Davies, *supra* note 58, at 301-26.

[176] 412 U.S. 291 (1973).

[177] *Id.* at 296. The Court did, however, allow admission of incriminating evidence found pursuant to what it termed a "very limited search," one "necessary to preserve the highly evanescent evidence [police] found under [the suspect's] fingernails." *Id.*

[178] 525 U.S. 113 (1998).

[179] *Id.* at 118-19. Indeed, the Iowa Supreme Court's contrary decision below expressly relied on the "could have" approach, based on its prior decision in *State v. Doran*, 563 N.W.2d 620 (Iowa 1997). According to *Doran*, search-incident authority:

en together, *Cupp* and *Knowles*, along with the Court's several landmark search-incident cases, in which arrests indisputably occurred,[180] make clear that an actual arrest must occur before a search is authorized—not merely that probable cause to arrest existed.[181]

> [I]s dependent upon facts that provide a legal basis for making a custodial arrest rather than the act of arrest itself . . . .
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> . . . .
>
> . . . We have adopted an objective or "could" assessment of the arresting officer's conduct in making the arrest "so long as the officer is legally permitted and objectively authorized to do so, an arrest is constitutional."
>
> . . . .
>
> . . . If the officer is legally permitted and objectively authorized to make the arrest, he is, for that reason alone, also authorized to make the search.

Id. at 622-23 (citation omitted). Expressing a sentiment strikingly prescient of the ramifications of *Atwater* itself, Justice Neuman wrote in dissent:

> It is, indeed, expedient . . . to enhance the power of police officers. . . . But the sweep of today's opinion will also sacrifice the personal privacy of "soccer moms" driving a little too fast to the ball field, senior citizens motoring along without a taillight, and otherwise "good kids" who fail to dim their high beams swiftly enough. All will be subject to search at the whim of the officer, not because they will be taken into custody, but because they could have been.

Id. at 624 (Neuman, J., dissenting).

[180] *See, e.g.*, New York v. Belton, 453 U.S. 454 (1981); United States v. Robinson, 414 U.S. 218 (1973); Chimel v. California, 395 U.S. 752 (1969). Furthermore, a basic assumption of search-incident doctrine is that a search is justified because of the incidence of an actual arrest. *See Belton*, 453 U.S. at 461 (stating that a "container may, of course, be searched whether it is open or closed, since the justification for the search is not that the arrestee has no privacy interest in the container, but that the lawful custodial arrest justifies the infringement of any privacy interest the arrestee may have"); *Robinson*, 414 U.S. at 235 (stating that an "arrest of a suspect . . . is a reasonable intrusion under the Fourth Amendment," and "that intrusion being lawful, a search incident to the arrest requires no additional justification").

[181] As the Wisconsin Supreme Court has observed, the Court's decision in *United States v. Robinson*:

> [M]ade clear that it is the fact of the lawful arrest which establishes the authority to undertake an extensive search for weapons and evidence of a crime. The actual making of a formal arrest, as opposed to the mere existence of grounds for doing so, is considered to be a significant event. The lawful arrest is not a mere formality, and without an arrest there is no justification for a full search incident to an arrest.

State v. Swanson, 475 N.W.2d 148, 154 (Wis. 1991) (citation omitted). *See also* State v. Pallone, 613 N.W.2d 568, 577 (Wis. 2000) ("For the search incident to arrest exception to apply, there must be an arrest . . . . The requirement of an arrest is a 'bright line rule'") (quoting *Knowles*, 525 U.S. at 113,117-18 (1998)); HARVEY CORTLAND VORHEES, THE LAW OF ARREST IN CIVIL AND CRIMINAL ACTIONS § 209, at 173 (2d ed. 1915) (stating "an

Nevertheless, the case law contains numerous instances of state and lower federal courts endorsing the "could have arrested" doctrine. Before *Atwater*, this tendency was common enough,[182] both raising constitutional concern and stunting development of the law of arrest.[183]

Predictably, *Atwater*, with its probable cause-based constitutional standard, has fostered proliferation of the view,[184] even though probable cause is neither susceptible of precise understanding[185] nor hard to satisfy.[186] Courts have also used the ra-

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officer has no right to search a person and seize anything upon him unless he has first arrested him").

[182] *See, e.g.*, United States v. Ricard, 563 F.2d 45, 49 (2d Cir. 1977) ("[T]he fact that [the officer] had cause to arrest appellant for speeding, even if he initially determined not to do so, was a sufficient predicate for a full search."); Commonwealth v. Mantinez, 692 N.E.2d 92, 96 (Mass. Ct. App. 1998) ("Probable cause for an arrest, even if not acted upon by a formal arrest, brings with it the 'search incident to arrest' exception to the warrant requirement for a search.") (citing *Commonwealth v. Brillante*, 399 Mass. 152, 155 n. 6 (1987)); State v. Roach, 452 N.W.2d 262, 266 (Neb. 1990) ("It is not necessary that an actual formal arrest occur before a search is undertaken, as long as probable cause for arrest does exist"); State v. Greenslit, 559 A.2d 672, 674 (Vt. 1989) ("[I]t is the existence of probable cause for the arrest which brings the search within constitutional limits, not merely the act of taking the individual into custody.").

[183] This underdevelopment stands in stark contrast to the rich jurisprudence concerning when a suspect is in "custody" for *Miranda* purposes and when a "de facto" arrest occurs (as opposed to a *Terry* stop) requiring probable cause. *See* Thomas K. Clancy, *The Supreme Court's Search for a Definition of a Seizure: What is a "Seizure" of a Person Within the Meaning of the Fourth Amendment?*, 27 AM. CRIM. L. REV. 619 (1999) (discussing distinctions between de facto arrests and stops); Anne Bowen Poulin, *The Fourth Amendment: Elusive Standards; Elusive Review*, 67 CHI.-KENT L. REV. 127, 138 n.76 (1991) (noting that "post-*Miranda* cases dwell on the definitions of custody and interrogation"). As a result, what Richard Uviller has called the "magical moment of arrest" has largely been mooted, disabling development of an important aspect of Fourth Amendment law. *See* H. RICHARD UVILLER, VIRTUAL JUSTICE: THE FLAWED PROSECUTION OF CRIME IN AMERICA 28 (1996). *See also* WAYNE R. LAFAVE, 3 SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 5.1, at 2 (4th ed. 2004) (noting that "[i]t is often important to determine whether or not the police have made an arrest and, if they have, precisely when the arrest occurred").

[184] *See, e.g.*, United States v. Pratt, 355 F.3d 1119, 1122-24 (8th Cir. 2004) (applying Missouri law and citing *Atwater* in support); People v. Branner, 92 Cal. Rptr. 3d 272, 276 (Cal. Ct. App. 2009) (citing *Atwater* in support).

[185] *See* Illinois v. Gates, 462 U.S. 213, 232 (1983) (noting that probable cause is a "fluid" concept "not readily . . . reduced to a neat set of legal rules"); Ornelas v. United States, 517 U.S. 690, 695 (1996) (noting difficulty in articulating "precisely what [probable cause] means"). In addition, of late the Court has haphazardly conflated probable cause with ostensibly lesser standards relating to reasonableness. *See, e.g.*, Maryland v. Pringle, 540 U.S. 366, 371 (2003) (stating that "[t]he substance of all the definitions of probable cause is a reasonable ground for belief of guilt").

tionale to justify otherwise impermissible delays in auto stops[187] because under *Atwater* police could have executed an arrest.[188] The persuasive appeal of the doctrine is so potent as to redeem searches when police have issued a citation before undertaking a search, an outcome contrary to *Knowles v. Iowa,*[189] again predicated on the argument that because police could have arrested they were entitled to search.[190]

The upshot of the foregoing is that police, with probable cause to believe that a minor offense has occurred, yet having a mere hunch of greater wrongdoing, can argue with constitutional justification that they could have arrested an individual, even if they do not. They can then lawfully conduct a body (or auto) search, and, if nothing more incriminating is discovered, engage in the time-honored practice of setting the individual free with a citation or warning.[191] Alternatively, in the absence of even a hunch of greater wrongdoing, police can arrest and search, and discover a basis justifying pursuit of a more serious prosecution, which itself too often pressures courts to indulgently assess already lax probable cause standards.[192] Finally, police can poten-

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[186] *See, e.g.,* Gates, 462 U.S. at 238 (describing the standard as tantamount to a "fair probability");Valdez v. McPheters, 172 F.3d 1220, 1227 n.5 (10th Cir. 1999) (noting that "probable cause itself is a relatively low threshold of proof"). As Bill Stuntz recognized several years before *Atwater* was decided, "In a world where trivial crimes stay on the books, or one where routine traffic offenses count as crimes, the requirement of probable cause to arrest may mean almost nothing." William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice,* 107 YALE L.J. 1, 7 (1997).

[187] *See* United States v. Sharpe, 470 U.S 675, 686 (1985) (requiring that police "diligently pursue[] a means of investigation that [is] likely to confirm or dispel their suspicions quickly").

[188] *See, e.g.,* United States v. Carpenter, 406 F.3d 915, 916 (7th Cir. 2005) (applying federal law); Wilkes v. State, 774 A.2d 420, 438 (Md. 2001).

[189] 525 U.S. 113 (1998).

[190] *Carpenter*, 406 F.3d at 916-17.

[191] *See* LAFAVE , *supra* note 157, at 186-88, 484-85 (noting widespread police "arrest and release" in the 1950s and 1960s); Jerome Hall, *The Law of Arrest in Relation to Contemporary Social Problems*, 3 U. CHI. L. REV. 345, 359-62 (1936) (describing same practice during the first decades of the twentieth century).

[192] *See* State v. Overby, 590 N.W.2d 703, 708 (N.D. 1999) (Vande Walle, C.J., concurring) (expressing concern that "with the expectation or hope that the search will produce such irrefutable evidence of the commission of a crime that a lack of probable cause to arrest prior to the search will be overlooked or such suspicion as did exist will be viewed more favorably in light of the evidence discovered in the search if, in fact, there is evidence discovered"); JEROME H. SKOLNICK, JUSTICE WITHOUT TRIAL 221 (1975) ("The illegality of a search is likely to be tempered—even in the eyes of the judiciary—by the

tially use *Atwater* to threaten arrest for a minor offense, presuming probable cause exists to support such an arrest, in order to secure "voluntary" consent to search,[193] which depending on the outcome of the search, can result in a more serious prosecution, or immediate freedom for the individual. Under any of these scenarios, Justice O'Connor's prediction in *Atwater* of a "grave potential for abuse" comes to fruition.[194]

C. "Mistakes" of Law

Atwater's apotheosis of probable cause and substantive laws has also served to heighten the importance of the latitude afforded police in their misapprehension of the laws they invoke to justify arrests. Historically, of course, lack of knowledge or misunderstanding of criminal laws has been rejected as a basis for citizens to avoid criminal liability.[195] With respect to police, courts typically reject government arguments that an officer's misapprehension of an invoked law can justify a seizure, on the view that enforcement of a non-existent legal standard itself is not objectively reasonable.[196] To find such a seizure justified would be to countenance a "failure to understand the law by the very person charged with enforcing it."[197] Doing so, furthermore, "would remove the incentive for police to make certain that they

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discovery of incriminating evidence on the suspect."); Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 799 (1994) ("Judges do not like excluding bloody knives, so they distort doctrine, claiming that the Fourth Amendment was not really violated.").

[193] *See* 3 LAFAVE, *supra* note 183, at § 8.2(c).

[194] *Atwater v. City of Lago Vista*, 532 U.S. 318, 372 (2001) (O'Connor, J., dissenting).

[195] *See* OLIVER W. HOLMES, THE COMMON LAW 41 (Belknapp Press, 1963):

> It is no doubt true that there are many cases in which the criminal could not have known that he was breaking the law, but to admit [legal mistakes] as an excuse at all would be to encourage ignorance where the law-maker has determined to make men know and obey, and justice to the individual is rightly outweighed by the larger interests on the other side of the scales.

For competing views surveying exceptions to the precept in modern case law, see Sharon L. Davies, *The Jurisprudence of Willfulness: An Evolving Theory of Excusable Ignorance*, 48 DUKE L.J. 341 (1998) (focusing on crimes that require willfulness mens rea); Dan M. Kahan, *Ignorance of the Law Is an Excuse—But Only for the Virtuous*, 96 MICH. L. REV. 127 (1997) (focusing on malum prohibitum crimes).

[196] 4 LAFAVE, *supra* note 183, at § 9.5 (citing cases).

[197] United States v. Tibbetts, 396 F.3d 1132, 1138 (10th Cir. 2005).

properly understand the law that they are entrusted to enforce and obey."[198]

This core understanding, however, has been eroded in recent years. Even though the law-fact distinction is not always clear-cut,[199] police are forgiven reasonable mistakes of fact, on which probable cause is based.[200] Moreover, legal standards themselves often admit of substantial interpretive flexibility. For instance, whether a car is operated on the streets in "good mechanical condition" is a legally and factually loaded determination made by officers—a determination in which they enjoy considerable legal latitude.[201]

In some courts, however, the line-drawing enterprise itself is of no moment. In the Eighth Circuit, for instance, officers are forgiven mistakes of law and fact alike. There, if an officer seizes an individual based on a mistaken understanding of the law she is enforcing, "the legal determination of whether probable cause or reasonable suspicion existed for the stop is judged by whether the mistake of law was an 'objectively reasonable one.'"[202] The Eighth Circuit's stance is shared by several states,

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[198] United States v. Lopez-Soto, 205 F.3d 1101, 1106 (9th Cir. 2000). *See also* People v. Teresinski, 605 P.2d 874, 877 (Cal. 1980) (asserting that a contrary rule "would provide a strong incentive to police officers to remain ignorant of the language of the laws and of the teachings of judicial decisions whose principal function frequently is to construe such laws and to chart the proper limits of police conduct.").

[199] *See generally* 6 LAFAVE, *supra* note 183, at § 11.7(c).

[200] *See, e.g.*, United States v. Booker, 496 F.3d 717 (D.C. Cir. 2007); United States v. Jenkins, 452 F.3d 207 (2d Cir. 2006) (applying New York law); United States v. Flores-Sandoval, 366 F.3d 961 (8th Cir. 2004) (applying U.S. law). *See also* Saucier v. Katz, 533 U.S 194, 206 (2001) ("Officers can have reasonable, but mistaken, beliefs as to the facts establishing the existence of probable cause . . . ."); Illinois v. Rodriguez, 497 U.S. 177, 185-86 (1990) (noting that factual determinations made by police need not "always be correct," but they always must be "reasonable"); Maryland v. Garrison, 480 U.S. 79, 87 (1987) ("[T]he Court has also recognized the need to allow some latitude for honest [factual] mistakes that are made by officers in the dangerous and difficult process of making arrests and executing search warrants.").

[201] *See* State v. Beauregard, 820 A.2d 183, 183 (Vt. 2003). *See also, e.g.*, United States v. Valdez, 147 Fed. App'x. 591, 594 (6th Cir. 2005) (construing Tennessee law providing that a vehicle "shall not follow another vehicle more closely than is reasonable and prudent").

[202] United States v. Washington, 455 F.3d 824, 827 (8th Cir. 2006) (citation omitted); *see also* United States v. Smart, 393 F.3d 767, 770 (8th Cir. 2005) ("[I]n our circuit, the distinction between a mistake of law and a mistake of fact is irrelevant to the fourth amendment inquiry. . . . [I]n mistake cases the question is simply whether the mistake, whether of law or fact, was an objectively reasonable one.").

which also forgive objectively reasonable mistakes of law by police, that is, unlawful but not unreasonable arrests.[203] Georgia goes even further, asking whether officers acted in good faith:

> If the officer acting in good faith believes that an unlawful act has been committed, his actions are not rendered improper by a later legal determination that the defendant's actions were not a crime according to a technical legal definition or distinction determined to exist in the penal statute. It is not the officer's function to determine on the spot such matters as . . . the legal niceties in definition of a certain crime, for these are matters for the courts.[204]

Meanwhile, other courts have signaled their generosity in motions to suppress by emphasizing that officers are not to be held to the standard of a prospective lawyer "taking the bar exam,"[205] and do not need to carry a "Decennial Digest" on the job.[206] As the Ninth Circuit has observed, an officer need not "have a precise appreciation of the niceties of the law. If the facts are sufficient to lead an officer to reasonably believe that there was a violation, that will suffice, even if the officer is not certain about exactly what it takes to constitute a violation."[207]

Thus, unlike *Alford*, where a legal mistake was forgiven because there existed unspecified alternative legal bases to justify the arrest, in the cases just noted no valid legal basis existed to support Fourth Amendment seizures.[208] Whether the Court's

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[203] *See, e.g.*, Harrison v. State, 800 So. 2d 1134, 1138-39 (Miss. 2001); State v. Greer, 683 N.E.2d 82, 86 (Ohio Ct. App. 1996).

[204] McConnell v. State, 374 S.E.2d 111, 113 (Ga. Ct. App. 1988). *McConnell*'s focus on subjective good faith would appear to be on weak footing after *Whren*; to date, however, Georgia courts seemingly have not deviated from the position. *See, e.g.*, Dixon v. State, 609 S.E.2d 148, 150-51 (Ga. Ct. App. 2005). *But see* Cash v. State, 593 N.E.2d 1267, 1269 (Ind. Ct. App. 1992) (holding that "simple good faith on the part of the arresting officer is not enough. If it were, 'the protection of the Fourth Amendment would evaporate.'" (quoting Terry v. Ohio, 392 U.S. 1, 21-22 (1968))).

[205] United States v. Wallace, 213 F.3d 1216, 1220 (9th Cir. 2000).

[206] Kelley v. Myler, 149 F.3d 641, 647 (7th Cir. 1998) (quoting Bodzin v. City of Dallas, 768 F.2d 722, 725 (5th Cir. 1985)).

[207] United States v. Mariscal, 285 F.3d 1127, 1130 (9th Cir. 2002).

[208] What the tendency means for civil rights actions sounding in false arrest and the right of citizens to resist unlawful arrests remains to be seen. *See, e.g.*, State v. Lindsay, 388 So. 2d 781, 782 (La. 1980) ("It is a long-established principle in Louisiana law that a citizen has the right to resist an unlawful arrest."); Riffe v. Armstrong, 477 S.E.2d 535,

recent decision in *Herring v. United States*,[209] making application of the exclusionary rule depend upon "deliberate" and "culpable" police errors,[210] will invigorate the tendency toward forgiving reasonable police mistakes remains to be seen.[211] There is no mistaking, however, that the indulgence undercuts vagueness doctrine, with its foremost concern over arbitrary police enforcement,[212] and qualifies as a highly troubling development in a society that prides itself on its dedication to the rule of law[213] and refuses to forgive similar citizen misunderstandings.[214] Not only do police now wield the power to act as de facto legislators, based on their discretionary authority to invoke (or nor invoke) extant laws, as Bill Stuntz has noted.[215] They also have the concomitant power to detain individuals for behavior never even legislatively proscribed.

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549 (W. Va. 1996) (noting that false arrest claim must be supported by proof of no legal authority to arrest).

[209] 129 S. Ct. 695 (2009).

[210] *See id.* at 702 ("To trigger the exclusionary rule, police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system.").

[211] Of course, attenuation doctrine further dilutes police incentive to master the substance of the laws they are expected to enforce. For instance, if voluntary consent to search is secured, such consent can cure a legally invalid stop or arrest, barring application of the exclusionary rule and allowing admission of any evidence or contraband obtained by the search. *See* Brown v. Illinois, 422 U.S. 590, 603-04 (1975).

[212] *See, e.g.*, Kolender v. Lawson, 461 U.S. 352, 360-61 (1983). On this connection more generally see Tracey Maclin, *What Can Fourth Amendment Doctrine Learn from Vagueness Doctrine?*, 3 U. PA. J. CONST. L. 398 (2001).

Importantly, in light of the judicial tendency to forgive police legal mistakes, legislative efforts to codify more detailed laws in order to limit police discretion and guard against successful vagueness challenges can have the opposite effect of facilitating indulgence of police mistakes of law. This is because the more intricate laws become, the greater the latitude police will be afforded for their legal mistakes. *Cf.* Kim Forde-Mazrui, *Ruling Out the Rule of Law*, 60 VAND. L. REV. 1497, 1525-26 (2007) (noting that efforts to make laws more specific have not appreciably lessened the discretionary authority of police).

[213] *See generally* RONALD A. CASS, THE RULE OF LAW IN AMERICA (2001). *Cf.* THE DECLARATION OF INDEPENDENCE para. 21 (U.S. 1776) (condemning use by British Crown of "pretended offences" to harass colonists); FRANZ KAFKA, THE TRIAL 3 (Willa Muir & Edwin Muir trans., Random House 1956) (1925) ("Someone must have traduced Joseph K., for without having done anything wrong he was arrested one fine morning.").

[214] *See* United States v. Chanthasouxat, 342 F.3d 1271, 1280 (11th Cir. 2003) (recognizing "the fundamental unfairness of holding citizens to 'the traditional rule that ignorance of the law is no excuse,' while allowing those 'entrusted to enforce' the law to be ignorant of it.") (citations omitted).

[215] William J. Stuntz, *Substance, Process, and the Civil-Criminal Line*, 7 J. CONTEMP. LEGAL ISSUES 1, 24 (1996).

CONCLUSION

Justice O'Connor's dissent in *Atwater v. City of Lago Vista* is notable both for its steadfast fidelity to Fourth Amendment reasonableness and its astute recognition of the personal and jurisprudential consequences of its abandonment. Wise at its time of issuance, moreover, the dissent has proved prescient. Rather than being merely "speculative," the "dearth of horribles" posited by the *Atwater* majority was and remains an empirical reality, predictably inspiring other troublesome practices, as outlined above. Stepping back, one can only hope that Justice O'Connor's dissent, like other great dissents, "may salvage for tomorrow the principle that was sacrificed or forgotten today."[216]

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[216] William O. Douglas, *The Dissent: A Safeguard of Democracy*, 32 JUDICATURE 104, 107 (1948). *See also* CHARLES EVAN HUGHES, THE SUPREME COURT OF THE UNITED STATES 68 (1928) ("A dissent in a court of last resort is an appeal to the brooding spirit of the law, to the intelligence of a future day, when a later decision may possibly correct the error into which the dissenting judge believes the court to have been betrayed.").

BRANDEIS IN *OLMSTEAD*: "OUR GOVERNMENT IS THE POTENT, THE OMNIPRESENT TEACHER"[1]

Carol S. Steiker[*]

Greatness, of course, lies in the eye of the beholder. A large part of what makes us revere a judicial dissent as "great" is our current conviction that the dissenter was "right" in some important way. At the most particular level, a dissenter could be right about a specific legal point. At a level of greater generality (and therefore of greater "greatness"), a dissenter could be right about a whole area of law or an interpretive approach that the dissenter brings to bear. At the most general (and therefore "greatest") level, a dissenter could be right not only about law or legal methodology, but also about something even bigger—a vision of constitutionalism, democracy, or the human condition.

Justice Louis Brandeis's dissent in *Olmstead v. United States*[2] from the Taft Court's decision to exempt governmental wiretapping from constitutional regulation is a natural choice for the category of "great dissents" because there is widespread consensus about its greatness. Such a consensus could also make it a boring choice because there is nothing very interesting about telling people something they think they already know. However, the consensus appears to be that Brandeis's *Olmstead* dissent is great in the first two senses previously described—its vindication on the issue of the constitutional status of wiretapping by the Warren Court in the famous *Katz* decision[3] and its grounding of Fourth Amendment guarantees as

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[1] Olmstead v. United States, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting).

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[2] *Id.* at 471-85.

[3] Katz v. United States, 389 U.S. 347 (1967).

rights of "privacy."[4] This conventional story, well-known to any reader of casebooks and law review articles on the Fourth Amendment, turns out to be seriously incomplete. The claim of Brandeis's dissent to "greatness" along these first two dimensions is less strong than is commonly believed because his view of wiretapping and his more general view of the "privacy" orientation of the Fourth Amendment have been far less fully vindicated than the celebratory view of his dissent implies. Moreover, I wish to assert that Brandeis's strongest claim to greatness in *Olmstead* lies in what is perhaps his least heeded exhortation, partially quoted in the title to this essay and more fully explored below. Thus, while I advocate for the greatness of Brandeis's *Olmstead* dissent, it is with an eye for complicating its legacy in ways that both diminish and augment the obvious grounds for cherishing it.

OLMSTEAD

To understand Brandeis's dissent in *Olmstead* requires an understanding of the underlying legal controversy. Just as the development of Fourth Amendment law in the latter part of the twentieth century has been driven in large part by the war on drugs, the *Olmstead* case was driven by the exigencies of enforcing Prohibition, which began in 1920, the year after the thirty-sixth state ratified the Eighteenth Amendment, and lasted until its repeal by the Twenty-first Amendment in 1933. *Olmstead* involved the investigation and eventual successful prosecution of Roy Olmstead, the infamous "King of the Puget Sound Bootleggers."[5]

Olmstead had begun his professional career on the other side of the billy club, as an officer in the Seattle Police Department. In 1920, still in his early thirties, Olmstead was the

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[4] *See, e.g.*, WAYNE V. MCINTOSH & CYNTHIA L. CATES, JUDICIAL ENTREPRENEURSHIP: THE ROLE OF THE JUDGE IN THE MARKETPLACE OF IDEAS 26 (1997) (describing how Brandeis's conception of Fourth Amendment "privacy" was "completely vindicated" and "enshrined in American law" in *Katz*).

[5] Daryl C. McClary, Olmstead, Roy (1886–1966) – King of King County Bootleggers, HISTORYLINK: THE FREE ONLINE ENCYCLOPEDIA OF WASHINGTON STATE HISTORY (2002), http://www.historylink.org (search encyclopedia for "Roy Olmstead" and then follow hyperlink under "Cyberpedia and Features").

youngest Lieutenant on the Seattle force when he was caught by federal agents from the Treasury Department's Prohibition Bureau smuggling liquor from Canada in violation of the National Prohibition Act, which had gone into effect on the first of the year.[6] Fined $500 and fired from the force, Olmstead devoted himself full time to bootlegging and quickly became the most successful and powerful bootlegger in the Seattle area, eventually running an organization of some fifty employees.[7] Olmstead's operation imported liquor from England to Vancouver in ocean freighters, transferred it to a fleet of speedboats that could each smuggle over 700 cases at a time into the United States, and distributed it by truck and car throughout the Seattle area.[8] Olmstead supplied not only numerous individual clients, but also "many of the better known hotels and restaurants in town, and even the local press club."[9] Distributing as many as 200 cases of alcohol a day, Olmstead's operations garnered gross receipts of as much as $200,000 a month and more than $2 million a year.[10] Olmstead was the general manager of the business, which he founded and ran with the assistance of eleven others.[11] Having contributed roughly half of the initial capital investment, Olmstead in return received half of the profits, with the other eleven partners sharing the remainder.[12] Olmstead's employees admiringly called him the "Big Boy," and he soon became a prime target for criminal investigation.[13]

State and local law enforcement were not much of a problem for Olmstead.[14] He was regularly tipped off by officials inside the Seattle police department, and even the city's mayor

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[6] *Id.*

[7] WALTER F. MURPHY, *WIRETAPPING ON TRIAL: A CASE STUDY IN THE JUDICIAL PROCESS* 17 (1965); McClary, *supra* note 5.

[8] Murphy, *supra* note 7, at 17.

[9] *Id.*

[10] *Olmstead*, 277 U.S. at 456 (majority opinion); Murphy, *supra* note 7, at 17.

[11] *Olmstead*, 277 U.S. at 456.

[12] *Id.*

[13] Murphy, *supra* note 7, at 16; *see also* David A. Sklansky, Katz v. United States: *The Limits of Aphorism, in* Carol S. Steiker, ed., CRIMINAL PROCEDURE STORIES 227 (Carol S. Steiker ed., 2006) (citing Norman H. Clark, *Roy Olmstead, A Rumrunning King on Puget Sound*, 54 PAC. NORTHWEST Q. 89 (1963) and Emmett Watson, *Seattle's Colorful Past*, SEATTLE POST-INTELLIGENCER, Oct. 20, 1974, at A1, A2).

[14] *See* Murphy, *supra* note 7, at 18.

was in his pocket.[15] Federal law enforcement, however, was another matter.[16] Although the United States Bureau of Prohibition was itself no stranger to corruption, dogged federal Prohibition agents in Washington State were not deterred from patiently building a case against the "Big Boy."[17] Despite being warned by his informants that "the feds" (also referred to as "Uncle") were on his tail, Olmstead blithely went about his business, unaware that his downfall would lie in the ubiquitous instrument of his commercial success—the telephone.[18]

Olmstead might be forgiven for underestimating the threat of electronic eavesdropping on his telephonic communications. Wiretapping was a criminal offense (though a misdemeanor) under Washington state law, and it was also officially prohibited by the federal government.[19] Harlan Fiske Stone, who was appointed Attorney General under President Calvin Coolidge in 1924—and who would later join the Supreme Court and Brandeis's dissent in *Olmstead*—ordered Justice Department officials not to wiretap.[20] The Treasury Department, which was charged with enforcing Prohibition, also officially opposed wiretapping.[21] Even J. Edgar Hoover, who was selected by Attorney General Stone in 1924 to be Director of the fledgling FBI (then called the Bureau of Investigation), expressed his disapproval of the practice.[22] Despite this official unanimity on the impermissibility of wiretapping, the job of enforcing Prohibition was daunting, if not outright impossible, in light of its enormous unpopularity and the rampant corruption and inadequate resources faced by law enforcement personnel.[23] Prohibition officers "were undoubtedly among the most frustrated people of all history."[24] Under these circumstances, dedicated Prohibition

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[15] *Id.*

[16] *See id.*

[17] *See id.* at 12, 18-19.

[18] *See id.*

[19] *Olmstead*, 277 U.S. at 466; Murphy, *supra* note 7, at 13.

[20] Murphy, *supra* note 7.

[21] *Id.*

[22] *Id.* at 13; *see also National Affairs: Another Hoover*, TIME, Dec. 29, 1924, at 2-3, *available at* http://www.time.com/time/magazine/article/0,9171,751183,00.html.

[23] Murphy, *supra* note 7, at 12.

[24] *Id.*

agents turned to the telephone wires with the hope and expectation that the ends would justify the means.

The wiretapping in Olmstead's case was extensive and methodical.[25] Over a period of almost five months, federal agents tapped the phones lines of Olmstead's central office and his home, as well as the homes and offices of several of his associates.[26] The agents produced 775 pages of typewritten notes on the conversations overheard during this period.[27] Federal investigators used the wiretap evidence to generate search warrants that led to the seizure of further evidence of Olmstead's bootlegging operation,[28] and federal prosecutors relied on the wiretap evidence in the grand jury to indict more than 90 people.[29] Olmstead eventually stood trial along with forty-six other defendants (including his wife) on charges of conspiring to violate the National Prohibition Act; the prosecutors made the wiretap evidence the centerpiece of their case.[30] Olmstead was convicted along with nineteen others (not including his wife) and sentenced to four years in prison plus an $8,000 fine and responsibility for prosecution costs.[31]

A panel of the Ninth Circuit affirmed Olmstead's conviction by a vote of 2-1, rejecting his challenge to the admission of the wiretap evidence and holding that electronic eavesdropping was not an impermissible Fourth Amendment "invasion" or "seizure," but rather was analogous to simply listening at a door or window, which was constitutionally inoffensive.[32] Judge Frank A. Rudkin dissented on the ground that the evidence obtained by the illegal wiretapping should have been suppressed as unconstitutionally seized under the Fourth Amendment.[33] If "ills" such as state-sanctioned illegal wiretapping were constitutionally permissible, Rudkin proclaimed dramatically, "our forefa-

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[25] *See Olmstead*, 277 U.S. at 471 (Brandeis, J., dissenting).

[26] *Id.*

[27] *Id.*

[28] Murphy, *supra* note 7, at 19-20.

[29] *Id.* at 22.

[30] *Id.* at 31-45.

[31] *Id.* at 44; McClary, *supra* note 5.

[32] Olmstead v. United States, 19 F.2d 842, 847 (9th Cir. 1927), *aff'd*, 277 U.S. 438 (1928).

[33] *Id.* at 849-50 (Rudkin, J., dissenting).

thers signally failed in their desire to ordain and establish a government to secure the blessings of liberty to themselves and their posterity."[34]

OLMSTEAD IN THE SUPREME COURT

The Supreme Court granted review solely on the constitutional question "whether the use of evidence of private telephone conversations between the defendants and others, intercepted by means of wire tapping, amounted to a violation of the Fourth and Fifth Amendments."[35] The Supreme Court, like the Ninth Circuit, was closely divided (the vote was 5-4), as was the court of public opinion; it is fair to say that *Olmstead* began a national debate about the legal and ethical ramifications of government wiretapping that has waxed and waned to this day. Chief Justice Taft wrote for the Court, rejecting constitutional arguments against the admission of the wiretapping evidence under both relevant Amendments.[36]

After reviewing the Court's recent precedents construing the Fourth and Fifth Amendments, Taft quickly dispatched the Fifth Amendment argument in exactly the way it would be dispatched were it to be raised today: there was no "compelled"[37] self-incrimination because there was "no evidence of compulsion to induce the defendants to talk over their many telephones."[38] The voluntary choice to transact business over the telephones made the only relevant issue the means used by the government to gain access to those voluntary communications—a question of search and seizure under the Fourth Amendment rather than impermissible compulsion under the Fifth.[39]

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[34] *Id.* at 850.

[35] *Olmstead*, 277 U.S. at 455.

[36] *Olmstead*, 277 U.S. at 466.

[37] The relevant phrasing of the Fifth Amendment reads, "No person shall be . . . . compelled in any criminal case to be a witness against himself . . . ." U.S. CONST. amend. V.

[38] *Id.* at 462.

[39] In an earlier case, the Court had suggested the possibility that reading the Fourth and Fifth Amendments together might somehow enlarge the scope of protected liberty. In *Boyd v. United States*, 116 U.S. 616 (1886), the Court had held inadmissible private papers whose production was compelled by subpoena, even though the subpoena was not technically a "search" or a "seizure" and the creation (as opposed to the produc-

As for the Fourth Amendment, Taft noted that all of the Court's search and seizure precedents involved some sort of "actual entrance into the private quarters of defendant and the taking away of something tangible."[40] In contrast, noted Taft, the wiretapping involved "no entry of the houses or offices of the defendants" and "[t]he evidence was secured by the sense of hearing and that only."[41] Rejecting the analogy between clandestine eavesdropping on a telephone conversation and opening a sealed letter in the mail, Taft maintained that a letter was a "paper" or an "effect" while a conversation did not fall within the literal language of the Fourth Amendment, which referred to the right of the people to be secure in "their persons, houses, papers, and effects."[42] Taft argued that attempting "to effect the purpose of the framers of the Constitution in the interest of liberty . . . . [could] not justify enlargement of the language employed beyond the possible practical meaning of houses, persons, papers, and effects, or so to apply the words search and seizure as to forbid hearing and sight."[43]

In response to the argument that the government's wiretapping was unethical and a misdemeanor under Washington state law, Taft noted that the common-law rule of long standing was that "admissibility of evidence is not affected by the illegality of the means by which it was obtained."[44] The Fourth

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tion) of the private papers was not "compelled." In *Olmstead*, Chief Justice Taft made no mention of such a Fourth/Fifth Amendment merger, although the idea still had enough currency to attract three of the four dissenters. Justices Brandeis and Butler both cited *Boyd* approvingly, with Brandeis even quoting *Boyd*'s provocative notion that "the Fourth and Fifth Amendments run almost into each other." *Olmstead*, 277 U.S. at 475 (Brandeis, J., dissenting). Justice Stone noted his agreement with both Brandeis and Butler's analyses. *See id.* at 488 (Stone, J., dissenting). Only Justice Holmes resisted the idea that "the penumbra of the Fourth and Fifth Amendments covers the defendant," though he agreed with the dissenters that the government should not be permitted to use evidence that it had secured through law-breaking. *See id.* at 469 (Holmes, J., dissenting). Today, *Boyd*'s notion of a Fourth/Fifth Amendment merger has been repudiated, *see, e.g.,* Fisher v. United States, 425 U.S. 391 (1976), and Justice Brandeis's dissent in *Olmstead* is remembered and revered solely as an exemplar of Fourth Amendment analysis.

[40] *Olmstead*, 277 U.S. at 464.

[41] *Id.*

[42] U.S. CONST. amend. IV.

[43] *Olmstead*, 277 U.S. at 465.

[44] *Id.* at 467.

Amendment exclusionary rule (announced by the Court in the relatively recent *Weeks* case[45]) was an exception to the common-law rule that should otherwise prevail in the general run of cases.[46] In the absence of a Fourth Amendment violation, Taft disclaimed Supreme Court authority to order the exclusion of evidence that was obtained unethically but not unconstitutionally, noting there was "no case that sustains, nor any recognized text book that gives color to such a view."[47] Moreover, in Taft's view, exclusion in such circumstances would constitute bad policy: "A standard which would forbid the reception of evidence, if obtained by other than nice ethical conduct by government officials, would make society suffer and give criminals greater immunity than has been known heretofore."[48] As for Washington State's misdemeanor law prohibiting wiretapping, nothing in the state statute purported to (nor lawfully could pretend to) prescribe rules of evidence for federal trials.[49] According to Taft, if wiretapping by federal officials was to be banned, it fell to Congress to say so.[50]

Justice Brandeis's dissent disagreed with the Court's analysis on both the construction of the Fourth Amendment and the relevance of the government's law breaking. Repudiating the majority's cramped textual analysis, Brandeis made a plea for what is now often referred to as "living constitutionalism," explaining: "Clauses guaranteeing to the individual protection against specific abuses of power, must have a similar capacity of adaptation to a changing world."[51] Looking backward, Brandeis observed that at the time of the adoption of the Fourth Amendment, "'the form that evil had theretofore taken,' had been necessarily simple."[52] Seizures took place "by breaking and entry."[53] But more modern times gave the government "[s]ubtler and

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[45] Weeks v. United States, 232 U.S. 383 (1914).
[46] *Olmstead*, 277 U.S. at 467.
[47] *Olmstead*, 277 U.S. at 468.
[48] *Id.*
[49] *Id.* at 469.
[50] *Id.* at 468.
[51] *Id.* at 472 (Brandeis, J., dissenting).
[52] *Id.* at 473.
[53] *Id.*

more far-reaching means of invading privacy. . . ."[54] And electronic eavesdropping was only the beginning, warned Brandeis: "The progress of science in furnishing the government with means of espionage is not likely to stop with wiretapping."[55] Brandeis asked, rhetorically, "Can it be that the Constitution affords no protection against such invasions of individual security?"[56]

The proper methodology for construing the Fourth Amendment, urged Brandeis, was not an approach of "unduly literal construction," but rather one that reasoned by analogy and sought to effect the underlying general purpose of the Amendment.[57] The proper analogy for wiretapping, argued Brandeis, was the opening of a sealed letter in the mail, a practice that the Court had ruled unconstitutional.[58] Moreover, in Brandeis's view, wiretapping was much *worse* than opening mail or the ordinary searching and seizing of tangible objects that could have been imagined at the time of the framing of the Constitution: "As a means of espionage, writs of assistance and general warrants are but puny instruments of tyranny and oppression when compared with wire tapping."[59]

According to Brandeis, the underlying general purpose of the Fourth Amendment was the protection of the right to privacy, or what Brandeis called, with simple elegance, "the right to be let alone"[60]—a right he had advocated and elaborated in the civil context in an influential article published in the *Harvard Law Review* before taking the bench.[61] In what is probably the most famous passage of his dissent, Brandeis expounded on his idea of privacy as the foundation the Fourth Amendment:

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[54] *Id.*

[55] *Id.* at 474.

[56] *Id.*

[57] *Id.* at 476.

[58] *See Ex Parte* Jackson, 96 U.S. 727 (1878) (holding that letters and sealed packages in the mail may be opened only pursuant to judicial warrant).

[59] *Olmstead*, 277 U.S. at 476 (Brandeis, J., dissenting).

[60] *Id.* at 478.

[61] Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

> The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men. To protect that right, every unjustifiable intrusion by the government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment.[62]

Moreover, to Brandeis, the noble intentions of the frustrated Prohibition agents did not mitigate in the least the wrongness of their intrusion on Olmstead's privacy; in another famous passage, Brandeis cautioned:

> Experience should teach us to be most on our guard to protect liberty when the government's purposes are beneficent. Men born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding.[63]

Brandeis also argued that the Court should have suppressed the use of the wiretap evidence on *non*-constitutional grounds, based on the unlawfulness of the government's conduct (presumably by use of the Court's inherent supervisory powers). Brandeis observed that wiretapping was a crime under Washington state law and not authorized by Congress, the Department of Justice, or the Prohibition Unit of the Treasury. In contrast to Taft's invocation of the common-law rule allowing the admission of evidence that had been illegally obtained, Brandeis invoked the principle of "unclean hands" from courts of equity, also commonly applied in courts of law in private disputes.[64]

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[62] *Olmstead*, 277 U.S. at 478-79 (Brandeis, J., dissenting).
[63] *Id.* at 479.
[64] *Id.* at 483-84.

This counter-doctrine denies the court's aid "when he who seeks it has violated the law in connection with the very transaction as to which he seeks legal redress."[65] In one sense, the precept that courts should not allow people to profit from their own crimes appeals to a non-instrumental sense of purity, to an idea of contamination more familiar to the ancient world than our own; Holmes captured this sense in his separate dissent when he referred to the government's law breaking as a "dirty business."[66] Brandeis, on the other hand, focused on the equally strong instrumental grounds for the doctrine of unclean hands, explaining that it was essential in order "to maintain respect for law."[67] Moreover, he noted that when the government (rather than a private party) was the lawbreaker, the reasons for applying the doctrine were "even more persuasive," and that when the case was one involving criminal punishment, the reasons became "compelling."[68] In the most stirring passage in a dissent full of passionate verve, Brandeis proclaimed:

> Decency, security, and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen. In a government of laws, existence of the government will be imperiled if it fails to observe the law scrupulously. Our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means—to declare that the government may commit crimes in order to secure the conviction of a private criminal—would bring terrible retribution. Against that pernicious doctrine this court should resolutely set its face.[69]

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[65] *Id.* at 484.
[66] *Id.* at 470 (Holmes, J., dissenting).
[67] *Id.* at 484 (Brandeis, J., dissenting).
[68] *Id.*
[69] *Id.* at 485.

BRANDEIS TRIUMPHANT

One of the primary reasons that Brandeis's dissent in *Olmstead* is so widely recognized as "great" is the fact that he was substantially vindicated by later events. In the short term, although Olmstead's conviction was upheld by the highest Court in the land and he served out the four years of his sentence, Olmstead eventually won his case in another way: he received a full pardon from President Franklin D. Roosevelt during the Christmas week of 1935, a pardon which restored his civil rights and relieved him of the $8,000 fine plus court costs that he had never paid.[70] It is hard to say whether the pardon reflected distaste for the government wiretapping that had netted Olmstead or simply for the recently repealed failed experiment with Prohibition. Whatever its motivation, the pardon turned out to be a good bet on the future: Olmstead experienced a religious conversion and went on to live a quiet and law-abiding life over the next three decades, teaching Sunday school and faithfully visiting prison inmates to spread the good word.[71]

The future eventually vindicated Roosevelt's pardon of Olmstead and Brandeis's dissent in a more direct and encompassing way—in the Supreme Court's formal overruling of its *Olmstead* decision in the famous 1967 *Katz* case,[72] decided a year after Olmstead's death at the age of 79. In *Katz*, the Court addressed professional gambler Charlie Katz's Fourth Amendment challenge to the FBI's wiretapping of the public telephone booth in Los Angeles from which he routinely placed his bets, often with out-of-state bookmakers. This wiretap, like that in *Olmstead*, did not require any entrance into the telephone booth (much less into a home or office); rather, the electronic listening and recording device (basically, a tape recorder with a microphone attached) was taped to the back of the phone booth.[73] The information collected from the wiretap was used to convict Katz of transmitting wagering information by telephone across state

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[70] *See The Presidency: The Roosevelt Week*, TIME, Jan. 6, 1936, *available at* http://www.time.com/time/magazine/article/0,9171,755551,00.html.

[71] McClary, *supra* note 5.

[72] Katz v. United States, 389 U.S. 347 (1967).

[73] *Id.* at 348-49.

lines in violation of federal law. In the Ninth Circuit Court of Appeals, the feds successfully defended their wiretap against Katz's appeal by arguing directly under *Olmstead* that there could be no Fourth Amendment violation because "[t]here was no physical entrance into the area occupied by [Katz]."[74]

The Supreme Court reversed. Although the Court had begun to question the underlying rationale of *Olmstead* in a few recently preceding cases,[75] it was not until *Katz* that *Olmstead* was clearly and officially interred. Justice Stewart wrote for the Court and squarely rejected the government's argument that the reach of the Fourth Amendment should "turn upon the presence or absence of a physical intrusion into any given enclosure."[76] Rather, the Court explained, "the Fourth Amendment protects people, not places,"[77] and thus the crucial question should be whether the government's actions violated the protection that the Amendment bestowed upon Katz himself, rather than upon the integrity of the telephone booth. The Court concluded that Katz's Fourth Amendment rights had been infringed because the government's wiretap "violated the privacy upon which [Katz] justifiably relied while using the telephone booth."[78] Justice Harlan wrote an influential concurrence that has come to be synonymous with *Katz* (though it was not joined at the time by any other Justice), explaining that the protection of "people, not places" requires an inquiry into whether a person had an "expectation of privacy" that is one that "society is prepared to recognize as 'reasonable.'"[79]

Had Brandeis still been alive in 1967 (he died in 1941), he surely would have had many reasons to count *Katz* as a belated vindication of his *Olmstead* dissent. On the most basic level,

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[74] Katz v. United States, 369 F.2d 130, 134 (9th Cir. 1966).

[75] *See* Silverman v. United States, 365 U.S. 505, 510-11 (1961) (finding that a government recording device constituted a Fourth Amendment violation even in the absence of a "technical trespass" because the placement of the microphone required some "physical encroachment" on the defendant's home); Warden v. Hayden, 387 U.S. 294, 304 (1967) ("The premise that property interests control the right of the Government to search and seize has been discredited.")

[76] *Katz*, 389 U.S. at 353.

[77] *Id.* at 351.

[78] *Id.* at 353.

[79] *Id.* at 361 (Harlan, J., concurring).

Katz declared the "trespass" doctrine of *Olmstead* "no longer . . . controlling,"[80] and Shephard's authoritative citation service lists *Olmstead* as "overruled" by *Katz*. Moreover, the rejection of *Olmstead*'s trespass doctrine would allow the Court in the future to regulate the "subtler and more far-reaching means of invading privacy" *not* involving "breaking and entry" that Brandeis had predicted would evolve.[81] Decades after the *Katz* decision, the Court would invoke it to strike down the government's use of a thermal imaging device used by federal agents to detect the heat emitted from a home without any trespass on the homeowner's property.[82] This sort of technological innovation is precisely what Brandeis imaginatively foresaw in 1928. Finally, Brandeis could have felt vindicated by the Court's replacement of the trespass doctrine with one more oriented toward the right of "privacy." The majority's language emphasizing "the privacy upon which [Katz] justifiably relied" and Harlan's concurring language emphasizing "reasonable expectations of privacy" appeared to echo Brandeis's emphasis on privacy as the central value underlying the Fourth Amendment.

THE LIMITS OF BRANDEIS'S TRIUMPH

Brandeis's triumph, however, is not nearly as neat or complete as it might seem or is often proclaimed to be. First, the last sentence of the preceding section says that the language of the *Katz* majority and Harlan's influential concurrence "appear" to echo Brandeis's emphasis on privacy, and the word "appear" is used advisedly here. Although *Katz*'s privacy-affirming language is oft cited, the case also contains important qualifiers on this language that, while less well-known, better predict the path that Fourth Amendment law was to follow after *Katz*. Perhaps most surprising to those familiar with the triumphal account of *Katz*, the majority opinion explicitly rejects the idea of "privacy" as a grounding rubric for the Fourth Amendment:

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[80] *Id.* at 353.
[81] Olmstead v. United States, 277 U.S. 438, 473 (1928) (Brandeis, J., dissenting).
[82] Kyllo v. United States, 533 U.S. 27 (2001).

> [T]he Fourth Amendment cannot be translated into a general constitutional "right to privacy." That Amendment protects individual privacy against certain kinds of governmental intrusion, but its protections go further, and often have nothing to do with privacy at all. Other provisions of the Constitution protect personal privacy from other forms of governmental invasion. But the protection of a person's *general* right to privacy—his right to be let alone by other people—is, like the protection of his property and of his very life, left largely to the law of the individual States.[83]

Perhaps most ironic, in light of the widespread view that *Katz* instantiated Brandeis's view of the Fourth Amendment, is the fact that while *Olmstead* is discussed throughout the *Katz* opinion, Brandeis's dissent is never mentioned; indeed, Brandeis's name appears but once, in a citation to his article about privacy as the right "to be let alone"—but only to clarify that this right is *not* the foundation of the Fourth Amendment![84]

In the decades following *Katz*, the Court frequently invoked the idea of "reasonable expectations of privacy" in order to determine the scope of the Fourth Amendment, but the Court's view of which expectations of privacy were reasonable tended to be narrow and bound by conventional understandings of property and place. On the role of property rights in Fourth Amendment analysis, consider *Rakas v. United States*, in which the Court held that the search of car did not violate any reasonable expectation of privacy of an occupant of the car who could assert "neither a property nor a possessory interest in the automobile, nor an interest in the property seized."[85] The Court paid lip service to *Katz* but noted that "the Court has not altogether abandoned use of property concepts in determining the presence or absence of the privacy interests protected by [the Fourth] Amendment."[86] On the role of place, consider the Court's opinion in *Kyllo*, which re-affirmed *Katz*'s holding that physical encroachment was not essential to establish a Fourth Amend-

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[83] *Katz*, 389 U.S. at 350-51 (footnotes omitted).
[84] *See id.*
[85] Rakas v. United States, 439 U.S. 128, 148 (1978).
[86] *Id.* at 143 n.12.

ment intrusion and while at the same time undermining *Katz*'s insistence that the Fourth Amendment protects people rather than places, by emphasizing the fact that the thermal imaging at issue was of a special place—the home. The *Kyllo* Court, building on a line of cases extending unbroken from long before *Katz* to the twenty-first century, held that the home is a place of unique protection: "In the home, our cases show, *all* details are intimate details, because the entire area is held safe from prying government eyes."[87] The turn to property rights and traditional views of constitutionally protected places is perhaps not surprising, given the indeterminacy of the idea of "reasonable expectations of privacy." But the attempt to give meaning to the *Katz* standard tended to undo it over time; as one scholarly observer has noted, wryly, "the results reached under the new, 'expectation of privacy' test looked surprisingly like the results that would have been reached under the old, 'trespass' test."[88] Thus, the apparent apotheosis of privacy as the Fourth Amendment touchstone in *Katz* quickly gave way to the reemergence of a kind of constitutional reasoning and a set of constitutional results that would likely be more appealing to the *Olmstead* majority than to Brandeis.

Privacy aside, the *Katz* decision contained an additional twist presenting another divergence from Brandeis's view in *Olmstead*. The *Katz* Court did not conclude its constitutional inquiry with its holding that governmental wiretapping was within the ambit of the Fourth Amendment's protection. Rather, having determined that the Fourth Amendment applied to electronic eavesdropping (even absent a physical intrusion into a constitutionally protected space), the Court went on to hold that what rendered unconstitutional the government's wiretapping of Katz's phone booth was the failure to get a judicial warrant to do so, which could have "accommodated the legitimate needs of law enforcement by authorizing the carefully limited

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[87] *Kyllo*, 533 U.S. at 37. The Court's special Fourth Amendment protection of the home has tended to create reduced protection everywhere else. As David Sklansky has observed, "In other places—automobiles, highways, fields, offices, even backyards—Fourth Amendment protection, as a practical matter, either vanished entirely or dropped off dramatically." Sklansky, *supra* note 13, at 257.

[88] Sklansky, *supra* note 13, at 254.

use of electronic surveillance."[89] This view of wiretapping—as just another garden-variety search and seizure that can be deemed reasonable (or not constitutionally "unreasonable") when authorized by a judicial warrant—is wholly out of sync with Brandeis's view that wiretapping was fundamentally inconsistent with the preservation of Fourth Amendment freedoms. Recall that in Brandeis's view, "writs of assistance and general warrants are but puny instruments of tyranny and oppression when compared with wire tapping."[90] Such writs would not be rendered acceptable if issued by a neutral magistrate; rather, their sweeping nature and scope make them so great a threat to liberty that they are constitutionally anathema whatever their source of issuance. In Brandeis's view, wiretapping belonged in the same category. His view had adherents up until the moment of the *Katz* decision: at the tail end of the Term immediately prior to the one in which *Katz* was decided, the Court debated, without deciding, whether warrants authorizing wiretapping were like general warrants in that they necessarily constituted a dragnet rather than a particularized search.[91] The *Katz* decision resolved this debate without further discussion in favor of permitting judicial warrants, but it is clear that Brandeis's view would have been to the contrary. Moreover, the failure of the Supreme Court to either ban wiretapping altogether or subject it to more specific limitations than the warrant clause left the whole field of regulation of wiretapping to the legislative branches—exactly the position urged by Chief Justice Taft in his opinion for the Court in *Olmstead*.

One final way in which Brandeis's *Olmstead* dissent has failed to emerge victorious in the post-*Katz* era has been the Court's rejection of the general constitutional methodology that Brandeis used to reach his particular interpretation of the Fourth Amendment. Brandeis urged that constitutional protections—*especially* "[c]lauses guaranteeing to the individual protection against specific abuses of power"—must have the "capac-

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[89] Katz v. United States, 349 U.S. 347, 356 (1967) (quotation marks and footnote omitted).

[90] Olmstead v. United States, 277 U.S. 438, 476 (1928) (Brandeis, J., dissenting).

[91] *See* Berger v. New York, 388 U.S. 41 (1967).

ity of adaptation to a changing world."[92] But in the decades since *Katz*, the Court has increasingly moved toward a textualist/originalist mode of constitutional interpretation—*especially* in the Fourth Amendment context, where the Court has looked to settled understandings at common law at the time of the framing of the Constitution in order to determine which government actions are reasonable today.[93] For example, in 1995, in *Wilson v. Arkansas*,[94] the Court was called upon to determine whether police officers must knock and announce their presence before breaking down a door in the execution of a warrant. Instead of attempting any consideration of the attributes and needs of contemporary law enforcement or the privacy concerns of contemporary citizens vis-à-vis the police in such contexts, the Court consulted only framing-era common law in rendering its decision. Similarly, in 2001, in *Atwater v. City of Lago Vista*,[95] the Court devoted the bulk of its constitutional analysis of the reasonableness of a custodial arrest for a fineable-only misdemeanor to consideration of whether common-law practices authoritatively precluded such arrests in the vastly different world of the eighteenth century. To what would undoubtedly have been Brandeis's great dismay, far from being the strongest case for purposive and openly normative constitutional elaboration, Fourth Amendment analysis has become the stronghold of historical exegesis.

The Supreme Court's failure in *Katz* and beyond to heed Brandeis's call in *Olmstead* for privacy as the fundamental grounding for the Fourth Amendment might seem naturally to lead here to a full-throated defense of Brandeis's dissent and a detailed critique of the myriad ways in which current law diverges from his vision. Such critiques are a staple of Fourth Amendment scholarship, along with more recent attempts to replace Brandeis's privacy grounding with some more attractive

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[92] *Olmstead*, 277 U.S. at 472 (Brandeis, J., dissenting).

[93] The best description and discussion of this development can be found in David A. Sklansky, *The Fourth Amendment and Common Law*, 100 COLUM. L. REV. 1739 (2000).

[94] 514 U.S. 927 (1995).

[95] 532 U.S. 318 (2001).

or administrable alternative.[96] Rather than engage in this debate over whether Brandeis's defense of privacy in *Olmstead* should have emerged more triumphantly from history than it has, I wish to turn the spotlight from the privacy aspect of Brandeis's dissent to a less discussed but (I suggest) even more significant or "greater" part of his analysis—Brandeis's concern about the "pernicious" effects of intentional government lawbreaking.

THE GOVERNMENT AS TEACHER

What could possibly constitute a bigger fish to fry than the right to privacy? My nomination for the "greatest" aspect of Brandeis's *Olmstead* dissent is his at once lyrical and indignant call for the repudiation of government lawbreaking in the pursuit of its own law enforcement goals.[97] Here, Brandeis went beyond offering a grounding theory or rubric for a particular constitutional provision and offered a more general normative observation about the relationship between government and citizen. Brandeis portrayed government ("our" government) as a teacher—and not just as any teacher, or as one among many teachers, but as "the potent, the omnipresent teacher." In Brandeis's view, government teaches not only by what it says, but by its example; if the government breaks the law, it teaches contempt for law, and thus "it invites every man to become a law unto himself; it invites anarchy." Government law breaking in pursuit of government law enforcement would, in Brandeis's dire prediction, "bring terrible retribution." "Against that pernicious doctrine this court should resolutely set its face." Bran-

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[96] *See, e.g.*, Thomas K. Clancy, *What Does the Fourth Amendment Protect: Property, Privacy, or Security?* 33 WAKE FOREST L. REV. 307 (1998); Christian M. Halliburton, *How Privacy Killed* Katz*: A Tale of Cognitive Freedom and the Property of Personhood as Fourth Amendment Norm*, 42 AKRON L. REV. 803 (2009); Jed Rubenfeld, *The End of Privacy*, 61 STAN. L. REV. 101 (2008); William J. Stuntz, *Privacy's Problem and the Law of Criminal Procedure*, 93 MICH. L. REV. 1016 (1995); Scott E. Sundby, *"Everyman"'s Fourth Amendment: Privacy or Mutual Trust Between Government and Citizen?* 94 COLUM. L. REV. 1751 (1994).

[97] The relevant passage, beginning "Decency, security, and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen . . . ." is reproduced in full above. The quotations in the following paragraph are found in this previously cited material. *See supra* note 69.

deis urged the Court's rejection of the government's lawbreaking not as a product of constitutional interpretation, but instead as grounded in the Court's inherent powers of justice, citing the similar exercise of power by courts of equity through the doctrine of "unclean hands."[98]

This passage is beautiful, but it has two other attributes that render it "great." First, it is astonishingly relevant. Brandeis was extrapolating from a specific context of government lawbreaking involving frustrated federal agents attempting to enforce Prohibition at a time when wiretapping was clearly (and criminally) prohibited. He wrote long before our country's most dramatic encounter with government lawbreaking—the Watergate scandal, often cited as promoting a sea-change in public attitudes about government.[99] Even more recent and more relevant is our country's post-9/11 encounter with the assertion by the federal executive branch of the right to use means that had long been considered illegal to fight the "War on Terror"—racial profiling, detention without hearing, torture, and domestic eavesdropping without congressional authorization. Brandeis presciently saw that the temptation "[t]o declare that in the administration of the criminal law the end justifies the means" was a universal one, and his warning against it remains startlingly fresh.[100] Second, Brandeis was right about the consequences of government law breaking—or as right as the current state of social science can confirm. Brandeis's assertion that government law breaking leads to private "contempt for law" has turned out to be more than homely folk wisdom—social scientists have treated it (or cognates of it) as a testable hypothesis that has tremendously important implications, both for the administration of criminal justice and for the establishment of appropriate moral and legal limits on the exercise of state power.

Of course, Brandeis's government integrity argument did not win in *Olmstead*, nor has it triumphed in the succeeding

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[98] *Olmstead*, 277 U.S. at 483-84.

[99] *See, e.g.*, Adam Clymer, *Watergate's Shadow Lies Across the Land*, N.Y. TIMES, June 14,1992, at § 4; p. 3; col. 1.

[100] *Olmstead*, 277 U.S. at 468.

eighty years. Although I argue above that Brandeis's privacy grounding for the Fourth Amendment has been far less vindicated than is commonly imagined, his "unclean hands" or government integrity argument has had even less success. In what follows, I will track the largely negative legal treatment of Brandeis's government integrity argument, particularly with reference to the Fourth Amendment, and then contrast this dismissal with the much more respectful treatment of Brandeis's argument by social scientists seeking to understand the wellsprings of human behavior.

As a doctrinal matter, what Brandeis appeared to be calling for in his government integrity argument in *Olmstead* was more robust use of courts' inherent, non-constitutional supervisory powers to refuse to participate in government wrongdoing and to sanction government actors for law breaking by excluding evidence obtained unlawfully from court. Even during the Warren Court era, however—the relative heyday of the use of the Fourth Amendment exclusionary rule—Chief Justice Warren himself dissented from the Court's failure to use its non-constitutional supervisory powers to exclude the testimony of a shady informant that the government had planted to infiltrate Jimmy Hoffa's legal team during the infamous "Test Fleet" trial.[101] An even more outrageous case during the Burger Court found the use of the Court's supervisory powers inappropriate, despite the fact that government agents had broken into a hotel room and stolen a briefcase with incriminating papers in it, on the ground that the person whose hotel room they broke into was not the defendant against whom the papers were used.[102] As a practical matter, although federal courts have invoked their inherent supervisory power with some frequency over the years to regulate a broad range of conduct,[103] the use of supervi-

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[101] *See* Hoffa v. United States, 385 U.S. 293, 315 (1966) (Warren, C.J., dissenting) ("[O]ne of the important duties of this Court is to give careful scrutiny to practices of government agents when they are challenged in cases before us, in order to insure that the protections of the Constitution are respected and to maintain the integrity of federal law enforcement.").

[102] *See* Payner v. United States, 447 U.S. 727 (1980).

[103] *See* Sara Sun Beale, *Reconsidering Supervisory Power in Criminal Cases: Constitutional and Statutory Limits on the Authority of the Federal Courts*, 84 COLUM. L. REV.

sory power to exclude relevant evidence of guilt in criminal trials in order to promote government integrity has been rare.[104]

Although Brandeis did not advance this argument himself in *Olmstead*, later judges (generally, though not always, dissenters) have used arguments founded on government integrity as a means to construe the Fourth Amendment itself, rather than as an extra-constitutional consideration. These judges have maintained either that law breaking by the government is relevant to determining whether the government's conduct is "reasonable" under the Fourth Amendment or that the preservation of government integrity is a (or even *the*) key rationale for the Fourth Amendment's exclusionary rule. Neither of these categories of attempts to import the government integrity idea into the Fourth Amendment itself has triumphed, but the argument has not been extinguished and still sparks to life occasionally in both federal and state opinions.

In the context of determining the Fourth Amendment "reasonableness" of various investigative tactics, the Supreme Court has given little or no weight to the fact that the tactics employed by the government were themselves criminal offenses. For example, in *Oliver v. United States*, the Court held that state narcotics agents in Kentucky did not invade any "reasonable expectation of privacy" by entering onto the defendant's land and bypassing a locked gate with a "no trespassing" sign posted on it, despite the fact that such action would almost certainly constitute a criminal trespass under Kentucky law.[105] Over strenuous dissent, the Court dismissed the criminal trespass law as protecting interests distinct from privacy and thus deemed it of "lit-

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1433, 1433 (1984) (describing the robust use of such power by lower federal courts and its "sporadic" invocation by the Supreme Court).

[104] *Id.* at 1453:

The exclusion of evidence to preserve the integrity of the courts and to deter official misconduct may interfere with the accuracy and reliability of the courts' search for the truth. Although the Court has often been divided on this issue, it has generally given precedence to the search for the truth .... (footnote omitted). *Id.*

[105] Oliver v. United States, 466 U.S. 170, 190 (1984) (Marshall, J., dissenting) ("In Kentucky, a knowing entry upon fenced or otherwise enclosed land, or upon unenclosed land conspicuously posted with signs excluding the public, constitutes criminal trespass.") (citing KY. REV. STAT. §§ 511.070(1), 511.080, 511.090(4) (1975)).

tle or no relevance" to Fourth Amendment analysis.[106] The Court took a similar approach in *California v. Greenwood*, validating the warrantless search and seizure of garbage bags left at the curb as constitutionally "reasonable" despite the widespread existence of ordinances prohibiting anyone except authorized trash removal personnel from interfering with garbage left for collection, presumably on similar grounds (i.e., that prohibitions on interfering with garbage are more likely based on aesthetic and public health grounds than on privacy grounds).[107] In a related and more general context, the Court in *Virginia v. Moore* held that arrests that are illegal under state law are still constitutionally reasonable, as long as they are supported by probable cause.[108] Here, the arrest was unlawful in the sense of unauthorized (and thus subject to disciplinary sanctions and tort remedies, rather than criminal punishment), and the Court relied on the undesirable complexity of altering the constitutional standard of reasonableness to accommodate the variety in state and local laws.[109] The Court did not suggest, however, that the lack of a criminal sanction for the violation was key to its holding; it simply did not consider any form of the argument from government integrity or consider whether the constitutional analysis might change in the context of willful violations of state criminal laws.

Despite the Supreme Court's skepticism regarding the relevance of government law breaking to Fourth Amendment reasonableness, the argument has had some greater appeal in state constitutional litigation, most likely because individual states do not face the problem that the Court noted in *Moore*—state constitutional standards need apply only statewide and thus do not have to accommodate any variety in the substance of criminal prohibitions. As a consequence, Brandeis's *Olmstead* dissent regarding government integrity finds its most approving

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[106] *Id.* at 183-84 (majority opinion). Ironically, the interests promoted by criminal trespass laws that the Court declared to be distinct from privacy interests were the landowners' property interests. *See Rakas*, 439 U.S. at 148.

[107] California v. Greenwood, 486 U.S. 35 (1988).

[108] 128 S. Ct. 1598 (2008) (upholding a full custodial arrest despite the fact that state law authorized only the issuance of a summons for the offense in question).

[109] *Id.* at 1607.

citations by state supreme courts interpreting their own analogs to the Fourth Amendment. For example, courts in both New York and Oregon have rejected the U.S. Supreme Court's holding in *Oliver* that entry onto "open fields" is constitutionally reasonable, citing the existence of state criminal trespass statutes prohibiting such conduct.[110] These courts held not only that the existence of these criminal statutes expressed statewide understandings of privacy, but also that the maintenance of governmental integrity required the suppression of evidence collected in such a manner. Both courts cited—indeed, quoted!—Brandeis's "government as teacher" language from *Olmstead*. Other state courts have used Brandeis's government integrity rationale (and credited his *Olmstead* dissent) to depart from additional restrictive Fourth Amendment rulings issued by the Supreme Court.[111] These deviations from the Supreme Court's federal constitutional rulings on the Fourth Amendment do not represent a majority or even a very substantial minority of state court rulings, but they do show that Brandeis's argument from integrity is alive and well, at least in pockets of state constitutional jurisprudence.

The second way that the argument from government integrity might play a role in Fourth Amendment analysis is as a rationale for the Fourth Amendment's exclusionary rule. Although the Court gave sympathetic voice to that argument in *Mapp v. Ohio* when it first incorporated the exclusionary rule (indeed, *Mapp* is the most famous and important case that quotes Brandeis's "government as teacher" language from *Olmstead*),[112] the integrity rationale has long been authoritatively discarded as a principle that should shape the constitutional contours of the rule. Although Justice Clark, writing for the Court in *Mapp*, invoked "the imperative of judicial integrity"

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[110] *See* People v. Scott, 593 N.E.2d 1328 (N.Y. 1992); State v. Dixson, 740 P.2d 1224 (Or. Ct. App. 1985).

[111] *See, e.g.*, State v. Hess, 770 N.W.2d 769 (Wis. Ct. App. 2009) (modifying the "good faith" exception to the warrant requirement under the Wisconsin state constitution in order to preserve government integrity); State v. Van Haele, 649 P.2d 1311 (Mont. 1982) (applying exclusionary rule under the Montana state constitution to exclude evidence illegally seized by private citizens and turned over to the police).

[112] Mapp v. Ohio, 367 U.S. 643 (1961).

and quoted Brandeis's *Olmstead* dissent at length,[113] little time passed before the Court fundamentally reoriented the grounding of the exclusionary rule. The following decade, in holding that the exclusionary rule did not apply in grand jury proceedings, the Court in *United States v. Calandra* sweepingly pronounced that the exclusionary rule was wholly preventive in nature: "[T]he rule is a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect . . . ."[114] Thus, held the Court in *Calandra* and many subsequent cases, the remedy of exclusion, which engenders substantial social costs by suppressing reliable evidence of guilt, should be limited to those circumstances in which it will have a significant marginal deterrent effect on government wrongdoing.[115] Consequently, because law enforcement officers presumably will be sufficiently deterred by the prospect of the suppression of illegally seized evidence at trial, there is no need to apply the exclusionary rule in grand jury proceedings as well. In such a calculus of marginal deterrent effects, there is simply no room for government integrity as a value to be safeguarded by the exclusionary rule. Two years after *Calandra*, in holding that Fourth Amendment exclusionary rule claims could not be raised on federal habeas corpus, the Court in *Stone v. Powell* placed the final nail in the integrity rationale's coffin.[116] After reviewing all of its Fourth Amendment holdings that appeared to be inconsistent with the judicial integrity rationale, the Court declared: "While courts, of course, must ever be concerned with preserving the integrity of the judicial process, this concern has limited force as a justification for the exclusion of highly probative evidence."[117]

While the role of the integrity argument as a grounding for the federal Fourth Amendment exclusionary rule might seem to be a long dead letter, a very recent decision by the Supreme Court appears to have breathed new life into the dispute,

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[113] *Id.* at 659 (citation omitted).
[114] United States v. Calandra, 414 U.S. 338, 348 (1974).
[115] *Id.*
[116] Stone v. Powell, 428 U.S. 465 (1976).
[117] *Id.* at 485.

though without changing the doctrine. Last Term in *Herring v. United States*, the Court refused to apply the exclusionary rule to suppress evidence found when the defendant, Herring, was searched pursuant to an arrest warrant listed in a neighboring county's database that had been recalled months earlier, though this recall had never been entered in the database.[118] The Court held that the exclusionary rule did not apply to the fruits of an unlawful arrest that was the product of "isolated negligence attenuated from the arrest,"[119] rather than from "deliberate, reckless, or grossly negligent conduct" or "recurring or systemic negligence."[120] Although the facts of *Herring* are odd enough that the reach of the Court's holding remains in doubt, the bare majority's announcement of what sounds like a new limitation on the scope of the exclusionary rule drew furious fire from the dissenters and resulted in a dissenting opinion that raised the government integrity rationale from the grave. Writing for all four dissenters, Justice Ginsburg questioned the deterrence rationale as the sole basis for the exclusionary rule and invoked instead "a more majestic conception of the Fourth Amendment and its adjunct, the exclusionary rule."[121] Lest it be unclear what such a conception could be, Justice Ginsburg explained the government integrity rationale with as much clarity, if not quite as much verve, as Brandeis:

> [T]he rule also serves other important purposes: It "enabl[es] the judiciary to avoid the taint of partnership in official lawlessness," and it "assur[es] the people—all potential victims of unlawful government conduct—that the government would not profit from its lawless behavior, thus minimizing the risk of seriously undermining popular trust in government."[122]

Following this explanation comes the obligatory quotation from Brandeis in *Olmstead*.[123]

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[118] Herring v. United States, 129 S. Ct. 695 (2009).

[119] *Id.* at 698.

[120] *Id.* at 702.

[121] *Id.* at 707 (Ginsburg, J., dissenting) (citation omitted).

[122] *Id.* (quoting United States v. Calandra, 414 U.S. 338, 357 (1974) (Brennan, J, dissenting)).

[123] *Id.*

Herring by no means suggests that the Court is teetering on the edge of reviving the integrity rationale for the exclusionary rule. The integrity rationale garnered only four votes last Term, and Justice Souter has already been replaced by Justice Sotomayor, who may not turn out to be a traditional Fourth Amendment liberal (or not as much of one as Souter was).[124] But while it is undeniable that Brandeis's government integrity argument has not been wildly successful in shaping legal doctrine, it is still fair to suggest that it remains a powerful idea with enough force to keep it alive in legal discourse, move the occasional state constitutional court, and perhaps—who knows?—spark a larger revival sometime in future.

In contrast, Brandeis's view has had the most success outside of the courts, in the non-legal, non-normative study of human behavior—the field of psychology. Brandeis's "government as teacher" argument posited that government law breaking would have a substantial effect on the behavior of ordinary citizens—in particular, that the courts' apparent imprimatur on government misconduct would "breed[] contempt for law" and "invite[] anarchy."[125] Brandeis's folk wisdom has a corresponding folk response: No, the best way to promote respect for law and to prevent anarchy is to ensure that those prosecuted for crimes are convicted. That is, inflicting just punishment on criminals is a better way to promote compliance with law than standing up for government integrity when doing so will interfere with the infliction of just punishment. It turns out that this folk debate is the stuff of serious scholarly inquiry and that over the past few decades, the tide has swung considerably toward the Brandeis view.

In his groundbreaking work *Why People Obey the Law*, psychologist Tom Tyler describes a longitudinal empirical study in which he measured the effect of "normative factors" in influencing citizens' compliance with the law independently of "deterrence judgments."[126] Tyler explains that people may obey the

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[124] *See* Jess Braven & Nathan Koppel, *Nominee's Criminal Rulings Tilt to Right of Souter*, WALL ST. J., June 5, 2009, at A3.

[125] Olmstead v. United States, 277 U.S. 438, 468 (1928).

[126] TOM R. TYLER, WHY PEOPLE OBEY THE LAW 4 (Yale Univ. Press 1990).

law because they view it is as just and moral to do so, as opposed to simply calculating whether they may face unpleasant sanctions for failing to obey. People's ideas about what is just and moral may come from their own internal morality, or from the perceived "legitimacy" of the authority enforcing the law (the view that "the authority enforcing the law has the right to dictate behavior"). [127] Tyler's experiment demonstrated that "normative issues matter"—that people obey the law because they believe it is proper to do so, that their views of whether it is proper to do so depend on perceived legitimacy, and—crucially, for the Brandeis perspective—that perceptions of legitimacy are influenced by adherence to procedural justice. [128] In particular, "[w]hen people react to their dealings with police officers and judges they focus their attention sharply on questions of procedural justice."[129] While the concept of "procedural justice" is a broad umbrella that encompasses many aspects of fairness that are far afield from Brandeis's concern about the toleration of government law breaking (such as consistency and suppression of bias), procedural justice also includes evaluation of "honesty and "ethicality" in the administration of the law,[130] concerns that presumably would encompass the toleration of law breaking by the judicial process. Tyler, in collaboration with others, has followed up with many further empirical studies consistently supporting the role of legitimacy and procedural justice in promoting legal compliance, particularly in the context of policing.[131]

Legal scholars have speculated that Tyler's work may explain some of the variations in crime rates and other forms of legal noncompliance that appear to correlate to places and times in which law enforcement legitimacy ebbs and flows. Law pro-

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[127] *Id.*

[128] *Id.* at 178.

[129] *Id.* at 104.

[130] *Id.* at 118; *see also,* Tom R. Tyler, *What is Procedural Justice?: Criteria Used by Citizens to Address the Fairness of Legal Procedures,* 22 LAW & SOC'Y REV. 103 (1988).

[131] *See, e.g.*, Tom R. Tyler, *Procedural Justice, Legitimacy, and the Effective Rule of Law*, 30 CRIME & JUST. 283 (2003); Jason Sunshine & Tom R. Tyler, *The Role of Procedural Justice and Legitimacy in Shaping Public Support for Policing*, 37 LAW & SOC'Y REV. 513 (2003); Tom R. Tyler & Cheryl Wakslak, *Profiling and Police Legitimacy: Procedural Justice, Attributions of Motive, and Acceptance of Police Authority*, 42 CRIMINOLOGY 253 (2004).

fessor and former federal prosecutor Bennett Capers has speculated that the month-long spike in crime across the board following the fatal shooting of unarmed Amadou Diallo in New York City, as well as the additional spike that followed the acquittal of the officers involved that following year, supports Tyler's claim that there is a correlation between perceptions of legitimacy and levels of crime.[132] He further suggests that there may be "smaller rebellions" or forms of legal noncompliance that may be the product of ebbing legitimacy, such as "[n]ot assisting the police by providing information about a crime," or "[d]isregarding jury duty, or serving but voting to acquit a guilty defendant to send a message about police practices."[133] The work of law professor and former state prosecutor, Tracey Meares, also stresses the links between legitimacy and law enforcement, with a particular interest in addressing crime policy in poor, minority neighborhoods.[134]

The insights of psychology have been far more kind to Brandeis's "government as teacher" argument than the courts have been. But that is no criticism; rather, it is the reason to celebrate this aspect of Brandeis's argument more than other aspects which may have found more vindication in the courts. The greatest sign of "greatness" is to be right—not in the sense of being borne out by legal doctrine, but rather right in the larger sense of describing a truth about the human condition. Brandeis's folk wisdom about the dangers that might follow from the official condoning of government law breaking has found strong vindication in the work of contemporary psychologists and offers insights to contemporary legal scholars and policy makers that have tremendous significance for the difficult policy choices that our criminal justice institutions currently face.

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[132] Bennett Capers, *Crime, Legitimacy and Testilying*, 83 IND. L.J. 835, 865 (2008).

[133] *Id.*

[134] *See, e.g.*, Tracey L. Meares, *Norms, Legitimacy, and Law Enforcement*, 79 OR. L. REV. 391 (2000); Tracey Meares, *The Legitimacy of Police Among Young African-American Men*, 92 MARQ. L. REV. 651 (2009).

"FOR GOOD OR FOR ILL . . ."

Although Brandeis declared that the government is a teacher "for good or for ill," his warning and this essay both focused on the "ill" part of his observation, on the consequences that might flow from official tolerance of government law breaking. But Brandeis's dissent is itself an illustration of the "good" aspect of his observation. Supreme Court Justices are, after all, part of the government, and they teach—perhaps most especially through their dissents.[135] Brandeis's dissent thus performs what I maintain is his "greatest" message in an opinion full of quotable, thought-provoking passages—in a government of law and not of men, the actions of the government are not merely the actions of men (or women), but rather, they carry a meaning and a consequence to which we fail to attend at our peril.

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[135] For a wonderful exploration of the ways in which dissents play an important role in promoting deliberation and legitimacy, see Lani Guinier, *Foreword: Demosprudence Through Dissent*, 122 HARV. L. REV. 4 (2008).

The James Otis Lectures

ANNUAL LECTURE SERIES

This lecture series is fittingly named after the man who not only ignited the American Revolution, but whose very words in opposition to the writs of assistance inspired the Fourth Amendment, James Otis.

Born in Great Marshes (now West Barnstable), Massachusetts, the eldest of thirteen children, Otis would devote his life to the law, as his father and grandfather had done before, becoming one of the most revered trial advocates and legal orators throughout Massachusetts, earning him the coveted position as Advocate General of the Vice-Admiralty Court at just thirty-one years of age, a position he would later resign to champion the cause against the Crown's arbitrary issuance of writs of assistance. The writs were general search warrants that permitted the authorities to search anywhere they pleased for any reason—or for no reason. In one of the first defiant stands against British authority in the Colonies, Otis attacked the writs as

"'against the fundamental principles of law.'"[1] He asserted, among other things: "A man's house is his castle; and while he is quiet, he is as well guarded as a prince in his castle. This writ, if it should be declared legal, would totally annihilate this privilege."[2]

John Adams, who witnessed Otis's impassioned oration, afterward declared: "Every man of an [immense] crowded audience appeared to me to go away, as I did, ready to take arms against [Writs] of Assistance. Then and there was the first scene of the first act of opposition to the arbitrary claims of Great Britain. Then and there the child Independence was born."[3]

Although Otis may have lost his case before the Massachusetts Superior Court in Boston's Old Town Hall that day, he gained a place in history. In that case, "the American tradition of constitutional hostility to general powers of search first found articulate expression."[4] It was Adams, so inspired by Otis's words, who later drafted Article Fourteen of the Massachusetts Declaration of Rights of 1780, which served as the model for the Fourth Amendment.

Otis would become one of the greatest Patriots our country has ever known. Though eventually reduced to insanity and ultimately silenced by a bolt of lightning, James Otis will forever remain first among America's Fourth Amendment advocates.

Thomas K. Clancy[*]

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[1] TELFORD TAYLOR, TWO STUDIES IN CONSTITUTIONAL INTERPRETATION 36-37 (1969) (quoting 2 LEGAL PAPERS OF JOHN ADAMS 125 (L. Kinvin Wroth & Hiller B. Zobel eds., 1965).

[2] *Id.* at 37 (quoting 2 LEGAL PAPERS OF JOHN ADAMS, *supra* note 1, at 142).

[3] 2 LEGAL PAPERS OF JOHN ADAMS, *supra* note 1, at 107.

[4] M.H. SMITH, THE WRITS OF ASSISTANCE CASE 7 (1978).

[*] Director, National Center for Justice and the Rule of Law. The Center, and consequently this lecture series and articles stemming from it, is supported by Grant No. 2000-DD-VX-0032 awarded by the Bureau of Justice Assistance. The Bureau of Justice Assistance is a component of the Office of Justice Programs, which includes the Bureau of Justice Statistics, the National Institute of Justice, the Office of Juvenile Justice and Delinquency Prevention, and the Office of Victims of Crime. Points of view or opinions in the articles are those of the author and do not represent the official position of the United States Department of Justice.

THE ROAD TO REASON: *ARIZONA V. GANT* AND THE SEARCH INCIDENT TO ARREST DOCTRINE

*Myron Moskovitz**

Officer Copp arrests Dan in his bedroom, handcuffs Dan, takes him out of the room, and locks him in a patrol car. Then Copp returns to the bedroom and searches the room. The officer has no search warrant, no probable cause to believe there is evidence in the room, and no reason to believe that some confederate might dispose of evidence in the room. Is the search valid?

Change the facts slightly. Dan is in the driver's seat of a car when arrested, then cuffed and locked in the patrol car. May Copp now return to Dan's car and search it—with no warrant, no probable cause to believe the car contains evidence of a crime, and no danger that the car will be driven off?

Until recently, many courts have answered "yes" to both questions—solely because the search occurred soon after an arrest and near the place of arrest.[1] Several commentators (including this one) have objected to these results, with little effect.

Now, however, *Arizona v. Gant* offers some hope that reason will replace dogma as the basis of the search-incident-to-arrest doctrine, and put some sensible limits on its scope.[2]

I. IN THE BEGINNING: *CHIMEL*

The trouble started with a landmark case, *Chimel v. California*,[3] which is generally known for its careful reasoning.[4]

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* Professor of Law, Golden Gate University. This article is adapted from the James Otis Lecture, delivered by Professor Moskovitz at the Universit of Mississippi School of Law in November of 2008.

[1] *See, e.g.*, Arizona v. Gant, 129 S. Ct. 1710, 1719 n.3 (2009).

[2] *Gant*, 129 S. Ct. 1710.

[3] Chimel v. California, 395 U.S. 752 (1969).

[4] I summarized *Chimel* more thoroughly in Myron Moskovitz, *A Rule in Search of a Reason: An Empirical Reexamination of* Chimel *and* Belton, 2002 WIS. L. REV. 657, 658-62 (2002).

Chimel held that an arrest justifies a warrantless search because the arrest might cause the arrestee to attack the arresting officer or dispose of evidence.[5] These two justifications limit the *scope* of the search to areas in which the arrestee might reach for a weapon or evidence. These justifications permit the officer to search the clothing worn by the arrestee, but not the area beyond where he might reach or lunge. So far, so good—this limitation on scope fits perfectly with the Court's justifications for this exception to the search warrant "requirement." But the Court also indicated that the justifications allow the police to search *within* the lunge area.[6] Therein lies the problem.

The Court assumed that the police arrest Dan while he is standing on a certain spot, then calculate the area into which he might reach, and—while Dan stands on that spot—search that area (including the insides of any drawers or other containers within that area). It never occurred to the Court that—in the real world—Dan will be nowhere near the spot of arrest when *the search* occurs. Immediately after arresting Dan, the police will usually handcuff him, remove him from the spot, and lock him in their patrol car. But then—relying on *Chimel's* dictum—might return to the spot and search the lunge area.[7]

Since *Chimel*, most lower courts *have not cared* that Dan is no longer at the spot of arrest when the police search the lunge area—the search of that area is fine even if Dan is long gone. The Supreme Court has spoken, and that's good enough for them. If pressed, some courts would concoct a new rationale for this strange stretch of the *Chimel* rationale. For example, the police were justified in removing Dan from the spot for their own safety, so they should not forfeit their "right" to search the area without a warrant.[8]

None of this made any sense to me, but my job nevertheless compelled me to explain it to a pack of wide-eyed, innocent law students year after year. I found myself embarrassed by the judicial system I was urging my pupils to respect. What to do?

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[5] *Chimel*, 395 U.S. at 762-63.
[6] *Id.* at 763.
[7] *Id.*
[8] *See, e.g.*, United States v. Turner, 926 F.2d 883 (9th Cir. 1991).

Maybe I could shake up the courts by *proving* to them that *Chimel's* premise was simply wrong: cops do *not* let Dan stand there while they search the area.

So I did a study. I asked police departments around the country what they tell their officers to do with the suspect after an arrest. The response was pretty much unanimous: "Cuff him and get him out of there." I reported my findings in a law review article.[9] Unlike most articles, this one seemed to have some effect on the Supreme Court. The mental meanderings of law professors only occasionally influence the Court, but the Justices pay more attention to *facts* shown by empirical research.

More on that later. First, let's review the effect of *Chimel's* mistake on *car searches*.

II. CAR SEARCHES—*BELTON* & *THORNTON*

In *New York v. Belton,* the arrestee was outside his car when he was arrested, along with his three passengers.[10] The officer then searched the car, finding cocaine in the pocket of a black leather jacket on the back seat.[11]

The situation was unusual. The single officer was outnumbered by the four detainees, and he might not have had room for all of them in his patrol car. So he left them where they were when they were arrested, and probably called for back-up to help take them in. Applying *Chimel's* logic, the Court should have *allowed* the officer to search the lunge area, which may—or may not—have included the back seat of the car and the jacket pocket.

But—held the Court—why bother with all this work, when a single "bright line" rule will do the trick: arrest a "recent occupant" of a car, and you can *automatically* search the entire passenger compartment and all containers that happen to be there. Why? Largely because "articles inside the relatively narrow compass of the passenger compartment of an automobile

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[9] Moskovitz, *supra* note 4, at 663-70.
[10] New York v. Belton, 453 U.S. 454 (1981).
[11] *Id.* at 456.

are in fact generally, even if not inevitably, within 'the area into which an arrestee might reach in order to grab a weapon or evidentiary ite[m].'"[12]

My study showed that this premise was pretty far off the mark. Articles in the passenger compartment are *not* generally within the area an arrestee might grab, because when the search occurs, the arrestee is almost always firmly sequestered in the back of the patrol car.[13]

Dissenting in *Belton*, Justice Brennan protested that this "single familiar standard" was at odds with *Chimel's* case-by-case approach.[14] A plethora of professors agreed with Brennan, to no avail.[15]

In *Thornton v. United States,* the Court reaffirmed *Belton's* broad rule.[16] While driving an unmarked police car, Officer Nichols learned that Thornton was driving a car whose tags did not match the car to which the tags had been issued. Thornton parked and left the car. Nichols "accosted" Thornton, who consented to a search of his person, which revealed marijuana and cocaine.[17] Nichols arrested Thornton, handcuffed him, and placed him in the patrol car. The officer then searched Thornton's car, finding a handgun.[18]

Chief Justice Rehnquist's plurality opinion held that the search of the car was incident to the arrest and therefore valid.[19] Thornton had argued that because the officer in *Belton* had "initiated contact" with the suspects while they were *in* the car, the police may search the car incident to arrest of a recent occupant only where this fact is present.[20] But in *Thornton,* Rehnquist's opinion held that this fact played no role in the *Belton* opinion.[21]

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[12] *Id.* at 460 (citation omitted).

[13] Moskovitz, *supra* note 4, at 675-76.

[14] "When the arrest has been consummated and the arrestee safely taken into custody, the justifications underlying *Chimel's* limited exception to the warrant requirement cease to apply: at that point there is no possibility that the arrestee could reach weapons or contraband." *Id.* at 465-66 (Brennan, J., dissenting).

[15] *See Gant*, 129 S. Ct. at 1716.

[16] Thornton v. United States, 541 U.S. 615 (2004).

[17] *Id.* at 617-18.

[18] *Id.*

[19] *Id.* at 619.

[20] *Id.* at 620-21.

[21] *Id.*

Therefore, "*Belton* governs even when an officer does not make contact until the person arrested has left the vehicle."[22] Why? "The need for a clear rule, readily understood by police officers and not depending on differing estimates of what items were or were not within reach of an arrestee at any particular moment, justifies the sort of generalization which Belton enunciated."[23]

Thus, *Thornton* confirms the *Belton* rule: A police officer may search the car of a "recent occupant" incident to arrest even if the suspect is nowhere near the car when the search takes place—for "officer safety" and to prevent destruction of evidence. This, I believe, is ridiculous. Neither of these dangers is in fact present if the suspect is nowhere near the car when the *search* occurs.

Justice Scalia concurred. He rejected three arguments that tried to squeeze the search into *Chimel's* justifications.[24]

First, in this case, could Thornton himself—at the time of the search—have reached into the car for a weapon or evidence? No. Unless Thornton was "possessed of the skill of Houdini and the strength of Hercules,"[25] the likelihood was minimal that he could have wriggled out of his handcuffs, leapt out of the squad car, and reached into his own car for a weapon or evidence—all before Officer Nichols could stop him. If such a danger was substantial, then there was an equal likelihood that Chimel could have escaped his captors and run upstairs to grab a weapon or evidence—but the Court in *Chimel* refused to allow a search of the upstairs incident to the downstairs arrest.[26]

Second, should there be *a general rule* "entitling" the police to search a car incident to a valid arrest? No, the Fourth Amendment is not a game where the police "win" the right to search. Warrantless searches must be justified by some identified need.

Third, is *Belton's* general rule justified by dangers *generally* occurring in the real world, so a general rule permitting such

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[22] *Thornton*, 541 U.S. at 617.
[23] *Id.* at 622-23.
[24] *Id.* at 625-29 (Scalia, J., concurring).
[25] *Id.* at 626 (quoting United States v. Frick, 490 F.2d 666, 673 (5th Cir. 1973)).
[26] *Chimel*, 395 U.S. at 768.

searches should apply even in a small minority of cases where those dangers are *not* present? No, in the real world there is usually *no* danger, because police are trained to get the arrestee away from the car before searching. Justice Scalia cited my study to support this last point.[27]

According to Scalia, *Belton's* rationale is wrong, but not its *rule*—at least in part.[28] Apparently impelled somewhat by *stare decisis*, Scalia would not overrule *Belton* but would instead "recast" the case with a *new* rationale (never mentioned in *Belton* itself): "the car might contain evidence relevant to the crime for which he was arrested."[29] Why? Scalia harks back to a couple of pre-Chimel cases[30] that justified area searches incident to arrest by "a more general interest in gathering evidence relevant to the crime for which the suspect has been arrested."[31] Scalia rejustifies this basis:

> There is nothing irrational about broader police authority to search for evidence when and where the perpetrator of a crime is lawfully arrested. The fact of prior lawful arrest distinguishes the arrestee from society at large, and distinguishes a search for evidence of his crime from general rummaging. Moreover, it is not illogical to assume that evidence of a crime is most likely to be found where the suspect was apprehended.[32]

But so what? If there is no danger that the arrestee (or someone else) might remove this evidence before the officer can obtain a search warrant, why not require the officer to go through the usual procedure of presenting his justification to a magistrate first? Scalia might have (but did not) invoked the reasoning of cases endorsing the "automobile exception" to the warrant requirement. In United States v. Chadwick, for exam-

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[27] *Thornton*, 541 U.S. at 628 (citing Moskovitz, *supra* note 4, at 665-66).

[28] *Id.* at 629.

[29] *Id.*

[30] United States v. Rabinowitz, 339 U.S. 56 (1950); Harris v. United States, 331 U.S. 145 (1947).

[31] *Thornton*, 541 U.S. at 629.

[32] *Id.* at 630.

ple, the Court held that because of the low (but not non-existent) expectation of privacy in a car, if the officer has probable cause to believe there is evidence of a crime in parts of a car, the officer may search those parts.[33] He needs no search warrant and no exigent circumstances preventing him from getting a warrant before the evidence might be removed or destroyed.[34] This low expectation of privacy also supports Scalia's new rule, arguably—at least insofar as it applies to car searches incident to arrest.

Has Scalia's new rule added anything to the automobile exception? That is, are there circumstances where the automobile exception would not apply but Scalia's "recasted" Belton rule would authorize the search? It seems so. Scalia would permit a search of an arrestee's car "where it is reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle."[35] If Scalia intended to add something to the auto exception (even though he failed to discuss that exception), then it must be this: "reasonable to believe" means something less than probable cause. Scalia must have intended this, because he never uses the familiar term probable cause in his concurrence.

How much less? We get some hint from Scalia's application of his new rule to the facts of *Thornton*. Because Thornton was arrested for a drug offense, "It was reasonable for Officer Nichols to believe that further contraband or similar evidence relevant to the crime for which he had been arrested might be found in the vehicle from which he had just alighted and which was still within his vicinity at the time of arrest."[36]

Was there *probable cause* to believe there were drugs in the car? Well, Officer Nichols had found three bags of marijuana and "a large amount" of cocaine in Thornton's pockets when he arrested Thornton, and Thornton had just been driving the car.[37] So Thornton might well be a drug dealer, and he *might* have been storing more drugs in the car. But maybe he kept them all

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[33] United States v. Chadwick, 433 U.S. 1 (1977).

[34] *Id.* at 22.

[35] *Thornton*, 541 U.S. at 632.

[36] *Id.*

[37] *Id.* at 618 (plurality opinion).

in his pockets. Probable cause? Tough question, but Scalia did not even bother to address it. Pretty strong evidence that Justice Scalia did *not* mean to equate "reasonable to believe" with probable cause.

I suspect that he meant "reason to believe" to mean something like the reasonable suspicion needed to justify a *Terry*-stop—more than a mere hunch, but less than probable cause.[38] If probable cause means something like a 51% chance that X is true, then reasonable suspicion means something like a 25% chance. That is probably what Scalia meant, and that is probably what future cases will hold.

Could the "reason to believe" flow from facts *other than* the nature of the crime for which the suspect was arrested? (Scalia does not address this.) I cannot see why not.

So why am I bothering to spend so much time on a concurrence? Well, *this* concurrence seemed very likely to command a majority of the Court, eventually, because Justice Ginsburg (from the left) signed on to Scalia's concurrence, and Justice O'Connor (from the center) wrote her own concurring opinion pretty much endorsing Scalia's.[39]

And that is just what happened in *Gant*: the majority adopted the rule proposed by Scalia in *Thornton*.

III. *ARIZONA V. GANT*

Officers knew that a warrant had been issued to arrest Gant for driving with a suspended license.[40] They saw Gant drive into a driveway, then get out of his car.[41] Officer Griffith was thirty feet from Gant when he called to Gant.[42] They approached each other, meeting ten to twelve feet from Gant's car.[43] Griffith arrested Gant, handcuffed him, and locked him in the backseat of a patrol car.[44] Then they searched Gant's car,

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[38] Terry v. Ohio, 392 U.S. 1 (1968).
[39] *Thornton*, 541 U.S. at 624-25 (O'Connor, J., concurring in part).
[40] Arizona v. Gant, 129 S. Ct. 1710, 1715 (2009).
[41] *Id.*
[42] *Id.*
[43] *Id.*
[44] *Id.*

finding a gun and cocaine in the pocket of a jacket on the back seat.[45]

Was the search of the car valid? It depends whether *Belton* is still good law, or Scalia's new rule has now become the law. *Belton's* general rule would clearly authorize the search, as Gant was a recent occupant[46] of the car and the arrest was valid.[47] Rehnquist's plurality opinion in *Thornton* would also authorize the search, as that opinion held that *Belton* applies whether or not the officer first initiated contact with the arrestee while he was in the car.[48] But Scalia's concurrence in *Thornton* would *not* authorize the search, because (1) Gant was out of reach of the car when the search occurred,[49] and (2) there was no "reason to believe" there was evidence of the crime for which Gant was arrested (driving with a suspended license) in the car.[50] So *Gant* presented the Court with a pretty clear choice: *Belton / Thornton* or Scalia? They chose Scalia—sort of.

Justice Stevens wrote the majority opinion. He conceded that *Belton* "has been widely understood to allow a vehicle search incident to the arrest of a recent occupant even if there is no possibility the arrestee could gain access to the vehicle at the time of the search"—blaming Brennan's concurrence for this view of *Belton*.[51] But that reading was wrong, says Stevens: "[W]e reject this reading of *Belton* and hold that the *Chimel* rationale authorizes police to search a vehicle incident to a recent occupant's arrest only when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search."[52] This new rule comports with part of Scalia's concurrence in *Thornton*—and Stevens then adopts the rest of Scalia's concurrence, stating: "Although it does not follow from *Chimel,* we also conclude that circumstances unique to the vehicle context justify a search incident to a lawful arrest when it

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[45] *Id.*
[46] *See* New York v. Belton, 453 U.S. 454, 460 (1981).
[47] *See id.* at 457.
[48] *See* Thornton v. U.S., 541 U.S. 615, 622 (2004).
[49] *See id.* at 625-27 (Scalia, J., concurring in part).
[50] *See id.* at 632.
[51] *Gant*, 129 S. Ct. at 1718.
[52] *Id.* at 1719.

is 'reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle.'"[53] Stevens goes on to distinguish *Belton* on its facts, noting that *Belton* involved a single outnumbered officer while here the arresting officers outnumbered Gant, and Belton was arrested for a drug offense (so there might be evidence of that offense in the car) while Gant was arrested only for driving with a suspended license.[54]

If *Belton* did *not* establish a "bright line rule" permitting automatic searches of cars incident to the driver's arrest, should the Court *now* adopt such a rule? No, says Stevens, because the threat to privacy is too great. While one has a *diminished* expectation of privacy in a car, it is not a *zero* expectation. And *Belton* permits police to search other, *more* private containers found *in* the car—such as purses and briefcases.[55] No general rule is needed because the majority's revamped reading of *Belton* protects against the arrestee's use of weapons and destruction of evidence, and other doctrines permit car searches in related situations: where a passenger poses a danger, and where there is probable cause to believe there is evidence in the car.[56]

Once again, Justice Scalia concurred. Since the majority opinion adopts pretty much his entire position in his *Thornton* concurrence, he is pretty satisfied with it—except for its revisionist view of *Belton*.[57] Scalia says *Belton* cannot be distinguished on its facts, because *Belton did not care* about the facts—the case applied a general rule. That general rule is wrong, so *Belton* (and *Thornton*) should simply be overruled.[58]

Justice Alito dissented, joined by Roberts, Kennedy, and (in part) Breyer. Alito claims that the majority *did* in fact overrule *Belton* and *Thornton* because—as Scalia also said—those cases applied a general rule, not dependent on the specific facts of the case, and application of that general rule to the facts of *Gant*

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[53] *Id.* at 1719 (quoting *Thornton*, 514 U.S. at 632 (Scalia, J., concurring)).
[54] *Gant*, 129 S. Ct. at 1719.
[55] *Id.* at 1720.
[56] *Id.* at 1721.
[57] *Gant*, 129 S. Ct. at 1724-25 (Scalia, J., concurring).
[58] *Id.*

would compel a result opposite to the one reached by the majority.[59] So far, I agree.

Alito then argues that *Belton's* general rule should be retained, because of *stare decisis*.[60] There is no "special justification" for refusing to follow a decided case, for several reasons.[61] First, the police *relied* on the *Belton* rule, because that rule has been taught to the police in their training programs.[62] (Not too persuasive, in my view. Just change the training regimen, at the cost of a few bucks to update the materials—which are updated anyway, to reflect new cases.) Second, no circumstances have changed since *Belton* was decided, because "surely it was well known in 1981 that a person who is taken from a vehicle, handcuffed, and placed in the back of a patrol car is unlikely to make it back into his own car to retrieve a weapon or destroy evidence."[63] If the *Belton* majority considered these circumstances in adopting the general rule, then all the *more* reason they were dead wrong. Third, Alito says that the *Belton* rule is not unworkable as, apart from determining whether the occupant was recent, the rule is relatively easy for the police to apply in most situations. However, it would be even more workable to have a rule that allows the police to search wherever they like if they first say "Mother may I," so long as one has no concern for the privacy interests protected by the Fourth Amendment. The *Belton* rule is not much better than this formulation. Fourth, *Belton* has not been undermined by subsequent cases.[64] (This time he's right—look at *Thornton*.) Finally, Alito defends *Belton's* reasoning: it represents "only a modest—and quite defensible—extension of *Chimel*."[65] Here's where things get interesting.

Alito says that while *Chimel* limited searches-incident-to-arrest to the arrestee's grab area, the opinion failed to specify whether this area is to be measured at the time of the arrest or

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[59] *Id.* at 1726-27.
[60] *Id.* at 1727-31(Alito, J., dissenting).
[61] *Id.* at 1728.
[62] *See id.*
[63] *Gant*, 129 S. Ct. at 1729.
[64] *Id.*
[65] *Id.*

the time of the search—"but unless the *Chimel* rule was meant to be a specialty rule, applicable to only a few unusual cases, the Court must have intended for this area to be measured at the time of arrest."[66] Why? Because usually the cop immediately handcuffs the arrestee and gets him away from the area of arrest for officer safety.[67] For support, Alito cites my study![68]

Normally, I am happy as a clam when a judge cites one of my articles. But this Justice uses my piece to support a conclusion *opposite* to the one I reached! Alito says that because "[h]andcuffs were in use in 1969" when *Chimel* was decided, the *Chimel* Court must have *known* that cops usually secure the arrestee before searching.[69] Therefore, when the Court said the police may search the "grab area", the Court *must* have intended to authorize the police to search that area *even after the arrestee is secured*.[70]

My conclusion was quite different.[71] I said that *Chimel's* scribbling about a search of the grab area was only a dictum because the *issue* before the Court in *Chimel* was the admissibility of evidence found *well outside* the grab area.[72] A dictum is worth less than a holding because the facts of the case do not force the court to think carefully about what they are saying, and therefore they make mistakes. That is exactly what happened in *Chimel*. The *Chimel* Court simply missed the boat on grab area because its attention was focused on overruling prior cases that had permitted the police to search *the entire house*. The mistake in *Chimel* led to the mistakes in *Belton* and *Thornton*, which the *Gant* majority finally corrected.

And that leads to the most interesting question: will *Gant* lead to correction of the *Chimel* mistake? Alito saw the problem. *Belton* was based on the *Chimel* dictum, which Alito assumes was right and I believe was wrong.[73] Because *Gant* effec-

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[66] *Id.* at 1730.
[67] *Id.*
[68] *Id.*
[69] *Gant*, 129 S. Ct. at 1730.
[70] *Id.*
[71] Moskovitz, *supra* note 4, at 660.
[72] *Id.*
[73] *Gant*, 129 S. Ct. at 1730.

tively overrules *Belton*, Alito says "if we are going to reexamine *Belton*, we should also reexamine the reasoning in *Chimel* on which *Belton* rests."[74] I agree. Alito also says, "there is no logical reason why the same rule should not apply to all arrestees."[75] Again, I agree. Let's do it right in all cases, not just cases involving car searches. But I disagree with Alito's conclusion. All arrestees should *not* have their homes and cars searched incident-to-arrest when there is no danger they could reach those places.

IV. THE FUTURE: CAR SEARCHES

The majority opinion in *Gant* authorizes the police to search the arrestee's car "incident to a recent occupant's arrest only when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search."[76] That standard should be pretty easy to apply, as courts have had a lot of experience dealing with the arrestee's reaching distance, or "grabbable area," at the time of *arrest*.[77] Courts need only apply those same criteria to where the arrestee was at the time of the *search*. As the Court indicates, the issue will rarely arise because the police will almost always secure the guy and get him away from his car before they search it.[78]

The majority in *Gant* also allows the police to search the arrestee's car when it is "reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle."[79] This is a new rule, and it needs elaboration. What does "reasonable to believe" mean? We've seen probable cause, and we've seen reasonable suspicion. Is "reasonable to believe" something new, different from these two familiar standards? I doubt it. I expect courts to equate "reasonable to believe" with the reasonable

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[74] *Id.* at 1731.
[75] *Id.*
[76] *Id.* at 1719.
[77] *See, e.g.*, State v. Robalewski, 418 A.2d 817 (R.I. 1980).
[78] *Gant*, 129 S. Ct. at 1719.
[79] *Id.* (quoting Thornton v. United States, 541 U.S. 615, 632 (2004) (Scalia, J., concurring)).

suspicion standard applied regularly to *Terry* stops.[80] It is hard enough to make a non-lawyer police officer tell the difference between probable cause and reasonable suspicion. It is not fair to saddle the officer with the burden of understanding a *third* standard, knowing where it fits with the other two, and then requiring the officer to *apply* that new standard to a new, unique set of facts with only a few seconds of thought and no legal opinion from some deputy DA or magistrate to guide him. And, since he has no search warrant, his good faith effort to apply this new standard will not protect him from suppression of the evidence if he gets it wrong.[81] It's just too much, and I doubt that the courts will impose such a burden on him.

I expect courts to apply the "reasonable to believe" standard on a case-by-case basis, just as they do when assessing the validity of a *Terry*-stop. It is possible, however, that courts might decide that certain *categories* of "offenses of arrest" *always* justify a search of the car. For example, a person arrested for selling narcotics will often have drugs nearby in his car, so why not make it easy on the police by establishing *a general rule* permitting a search of the car without further facts indicating that there is evidence of sales in the car? Or does this hark back to *Belton's* now-disapproved general rule? We will see.

Justice Alito raises another issue: "[W]hy is this type of search restricted to evidence of the offense of arrest?"[82] Good question. I can't see why it should be so restricted. The only justification for reducing the cause needed to search the car below probable cause is the reduced expectation of privacy one has in a car. If the officer has reasonable suspicion from *any* source for believing there is evidence of a crime in the car, the *Gant* majority's logic should allow him to search the car.

Alito also asks "why an evidence-gathering search incident to arrest should be restricted to the passenger compartment."[83]

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[80] *See, e.g.*, Hiibel v. 6th Jud. Dist. Ct. of Nev. Humboldt County, 542 U.S. 177 (2004); United States v. Sharpe, 470 U.S. 675 (1985).

[81] *See* United States v. Leon, 468 U.S. 897 (1984).

[82] *Id.* at 1731.

[83] *Id.*

Another good question. That restriction is an artifact of *Belton*, which seemed to "reason" as follows:

(1) *Chimel* allowed a search of the area around Dan at the time of arrest;

(2) *If* Dan were in the car when arrested, he could then reach into any place or container in the passenger compartment, but not into the trunk;

(3) We now extend *Chimel* to the arrest of a "recent occupant", so we will hypothetically put him *back* into the car and assume he was arrested there; and so (4) *Voila*, the officer can search the passenger compartment but not the trunk. Very strange "logic."

As *Gant* changes the rule and the rationale, the scope of the allowable search should change too. Under the auto exception, the Court assumes that the lowered expectation of privacy in a car applies to the entire car, so if the officer has probable cause to believe there is evidence in the trunk, he may search the trunk without a warrant.[84] (I do not necessarily agree with this, as people tend to store private things in a trunk more often than they store them in the passenger compartment. But the Court has spoken.) As I said above, I think *Gant* allows a search of a car if the officer has reasonable suspicion to believe there is evidence of a crime in the car—because of that same lowered expectation of privacy in a car. If that lowered expectation permits a search of the trunk under the auto exception, it should permit a search of the trunk under the *Gant* exception too.

Will *Gant* lead to a change in the auto exception? Maybe. The auto exception is one strange animal. It started, I believe, simply as an application of the "probable cause + exigent circumstances" exception to the search warrant requirement. The Fourth Amendment generally requires probable cause, and the Court generally requires the officer to seek out a magistrate to issue a search warrant—unless exigent circumstances prevent the officer from getting a warrant before the evidence is destroyed, hidden, or carried away. The auto exception evolved into a separate category because usually the fact that the evi-

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[84] *See* United States v. Ross, 456 U.S. 798 (1982).

dence is in a car means that it can be driven away by someone before the officer can obtain a warrant; thus the car provides the exigent circumstances. But not always. Sometimes the car is disabled or there is no one to drive it away. Even in these cases, however, the Supreme Court upheld the search.[85] The Court finally explained these anomalies by finding *a different basis* for the exception. In *United States v. Chadwick*,[86] the Court said that the auto exception is based not on the car's inherent mobility, but on the lowered (but not non-existent) expectation of privacy in a car.

Fine, but what test *should* be applied to car searches? Why probable cause, and not mere reasonable suspicion? Probable cause is required for an arrest. A *Terry*-stop intrudes on an expectation of liberty *lower* than an arrest, so we don't require probable cause for a *Terry*-stop—only reasonable suspicion is required. By like reasoning, only reasonable suspicion should be required for a car search, where a lower expectation of privacy also attaches. Justice O'Connor made a similar proposal in her dissenting opinion in *Arizona v. Hicks*.[87] The majority held that the police could look under a stereo in a home only if they had probable cause to believe there was evidence beneath the stereo. O'Connor assumed that this intrusion on privacy was enough to constitute a "search," but felt the intrusion was so low that reasonable suspicion (the *Terry* standard) should be enough to justify "a cursory examination of an item in plain view."[88] She noted that the intrusion in *Terry* (a forcible stop) was much more intrusive on privacy than moving the stereo a few inches. The same reasoning would seem to apply to the search of a car, given the Court's "low expectation of privacy" rationale for the auto exception.

But no. The Court in *Chadwick* stuck to the old test for the auto exception: probable cause. Why? Probably from some sense of deference to *stare decisis*. The Court wanted to clarify

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[85] *See, e.g.*, Cady v. Dombrowski, 413 U.S. 433, 436 (1973) (car disabled as result of an accident); Chambers v. Maroney, 399 U.S. 42, 52 (1970) (search conducted while car at police station and occupants in custody).

[86] United States v. Chadwick, 433 U.S. 1, 12-13 (1977).

[87] Arizona v. Hicks, 480 U.S. 321, 333 (1987) (O'Connor, J., dissenting).

[88] *Id.* at 334.

the *basis* for the rule, but preferred not to tinker with the rule itself.

But *Gant* has changed the picture. Car searches now are *permitted* on mere reasonable suspicion—at least right after an arrest and where the reasonable suspicion is connected to "the offense of arrest."[89] But why these limitations? How does the fact of arrest affect the driver's or owner's lowered expectation of privacy in the car? Not much. One is just as troubled (or not troubled) by an officer's search of one's car whether one has been arrested or not. Scalia, however, believes that the arrest *does* matter, as it "distinguishes the arrestee from society at large," and "it is not illogical to assume that evidence of a crime is most likely to be found where the suspect was apprehended."[90] Well, it will be "illogical" in some situations, and the "reasonable to believe" test should be adequate to distinguish the logical from the illogical.

The upshot of all this: if the Court gets around to deleting these restrictions, it might as well use its resulting new rule to replace (or redefine) the auto exception with a revamped *Gant* exception. The *Gant* majority characterized its new rule as a revised *Belton* rule. *Belton* placed its rule under the search-incident-to-arrest exception. The *Gant* majority opinion approved of *Belton*, so it looks like a revised *Belton* rule, belonging under the search-incident-to-arrest doctrine. But it really *does not* belong under that exception because only rarely will *Chimel*'s *justifications underlying* the search-incident-to-arrest exception apply to searches of a car incident to an arrest (because the arrestee will almost never be able to reach the car for weapons or evidence when the officer searches the car).

Instead, the guts of *Gant* are its *new* rule permitting the officer to search the car when it is "reasonable to believe" there is in the car evidence of the "offense of arrest." So the focus is now on the likelihood that there is evidence of a crime in the car—which is exactly the focus of the auto exception. There is not much need for both, so I predict (speculate, actually) that when

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[89] *Gant*, 129 S. Ct. at 1719.

[90] *Thornton*, 541 U.S. at 630.

the Supreme Court gets around to deleting or modifying the restrictions that Justice Alito criticized, the new "updated" *Gant* rule will displace the old auto exception.

V. CAR SEARCHES—SOME HYPOTHETICALS

Let's play with a few hypos.

1. Officer Copp stops Dan for speeding. Copp runs a warrant check, which brings up a warrant to arrest Dan for selling cocaine. The warrant says nothing about the date, place, or circumstances of the alleged cocaine sale. Copp handcuffs Dan and locks him in the patrol car. Does *Gant* allow Copp to search Dan's car for cocaine? I don't think so. Without more, what Copp knows does not make it "reasonable to believe" (in my view, this means reasonable suspicion) that Dan was selling cocaine out of his car or transporting it in his car.

2. Same facts, but when Copp searches Dan's clothes incident to the valid arrest on the warrant, Copp finds a pound of cocaine and $10,000 in Dan's pockets. Now may Copp search Dan's car? Clearly he could do so under *Gant*, as Copp has plenty of reasonable suspicion to believe Dan might be transporting in the car "evidence of the crime of arrest" (sale of cocaine).

But Copp probably *doesn't need Gant* to justify the search. The sum of all these facts seems to add up to *probable cause* to believe there is evidence of cocaine sales in the car, so the *auto exception* authorizes the search.

3. Same facts as #1, but Copp finds only a small baggie of cocaine in Dan's pockets. May he search the car? Now the sum of the facts does *not* seem to add up to probable cause to believe there is evidence in the car, so the auto exception would not appear to work. But I think *Gant* would authorize the search, because the warrant for selling cocaine plus the discovery of the baggie of cocaine shows that Dan is regularly involved with cocaine and so there is at least a 25% chance (?) that there are more drugs, sales money, paraphernalia, etc., in the car.

May Copp search the *trunk,* or just the *passenger compartment*? Because the *Gant* majority did not overrule *Belton*, it seems that *Gant* authorizes Copp to search only the passenger compartment of Dan's car. Justice Alito has problems with this,

and so do I. As I indicated above, if *Gant's* reasonable suspicion standard is justified by the lowered expectation of privacy one has in a car, that should justify a search of the trunk too.[91]

4. Copp stops Dan for speeding, and the warrant check shows a warrant for driving with a suspended license. Copp's search of Dan's clothing turns up a small baggie of cocaine and $5,000. This is a tough one. I don't think this adds up to probable cause to believe there are more drugs or related items in the car (so the auto exception would not apply), but this might be enough for reasonable suspicion.

But this search would not be for "evidence of the crime of arrest,"[92] so the *Gant* majority opinion would not seem to permit it. Justice Alito questioned this, and so do I, as indicated above.[93] It seems that this limitation on car searches incident to arrest was only dicta in *Gant*, so maybe the Court will reconsider it when the right facts come before it.

VI. THE FUTURE: HOME SEARCHES

As I said above,[94] I think the Court should reexamine the *Chimel* dictum allowing the police to search the "grabbable area" around the arrestee at the time of arrest—even though he is nowhere near that area at the time of the search. As my earlier study shows, police officers are instructed to get the guy secured and out of that area immediately after arrest—and that is what they usually do. There is no danger of any reach for weapons or evidence in that area, so no search should be allowed under the search-incident-to-arrest doctrine.

The logic of Gant's majority opinion (and certainly Justice Scalia's concurrence) supports this analysis, and I predict that this is exactly what the Court will do when it accepts a case presenting these facts in a home search. That case will probably

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[91] The Court has extended the auto exception to include *containers found in* the car. California v. Acevedo, 500 U.S. 565 (1991). This goes too far, in my view, because your expectation of privacy in your suitcase found in your trunk is much higher than, say, a jacket found on your back seat.

[92] *Gant*, 129 S. Ct. at 1719.

[93] *See supra* note 72 and accompanying text.

[94] *See supra* notes 6-8 and accompanying text.

resemble United States v. Turner,[95] where the police arrested Turner in a room and saw a gun next to him. They handcuffed him and took him out of the room. Then they returned and searched the room where the arrest took place, finding a rifle, ammunition, and cocaine.[96]

The Court of Appeals upheld this search—even though Turner could not reach that room when the search occurred—because (1) the area searched was within Turner's reach when he was arrested, and (2) the decision to remove Turner from the room was justified by the officers' concern for their safety, as they had already found a gun near Turner when he was arrested.[97]

In his *Thornton* concurrence, Justice Scalia rejected this sort of reasoning, stating:

[C]onducting a *Chimel* search is not the Government's right; it is an exception—justified by necessity—to a rule that would otherwise render the search unlawful. If "sensible police procedures" require that suspects be handcuffed and put in squad cars, then police should handcuff suspects, put them in squad cars, and not conduct the search.[98]

Scalia will find it pretty hard not to apply the same analysis to a home search. Indeed, the argument for limiting searches-incident-to-arrest in the home is *even stronger* than in a car, because the Court (including Justice Scalia) seems to go out of its way to protect the sanctity of the home.[99]

Scalia convinced a majority in *Gant*, and I think he will do so again when a case like *Turner* hits the Court. Will the Court include the new wrinkle Scalia added in *Thornton* and adopted by the majority in *Gant*—allowing the police to search the grabbable area when it is "reasonable to believe" that the area contains "evidence of the crime of arrest"? I don't think so. While the recent justices have not enforced the Fourth Amendment nearly as much as earlier justices (e.g., on the Warren Court),

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[95] 926 F.2d 883 (9th Cir. 1990)

[96] *Turner*, 926 F.2d at 885-86.

[97] *Id.*

[98] *Thornton*, 541 U.S. at 627 (Scalia, J., concurring).

[99] *See, e.g.*, Kyllo v. United States, 533 U.S. 27 (2001); Arizona v. Hicks, 480 U.S. 321 (1987). Justice Scalia wrote the majority opinion in both of these cases.

they have been quite protective when it comes to home searches.[100] Permitting the police to search the home (the *entire* home?) on mere reasonable suspicion—without a warrant or exigent circumstances—merely because there was an arrest in the home goes much too far. The lower expectation of privacy in cars might justify this new *Gant* exception, but it would not seem to justify an intrusion on the privacy of the home. And, for good measure, we don't want to encourage the police to arrange home arrests in order to take advantage of a *Gant*-like exception.

CONCLUSION

We've come a long way. *Belton* (and *Thornton*) undermined the Fourth Amendment's protection of privacy by setting out a general rule that bore no resemblance to what the police usually do in the real world. *Gant* brought the Court back on the track of rationality and realism. There are still several kinks in the opinion that need straightening, but now that the Court is back on the road to reason, that shouldn't be too hard.

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[100] *See supra* note 99 and accompanying text.

RECENT DECISION

CONSTITUTIONAL LAW—SEARCHES AND SEIZURES BY SCHOOL OFFICIALS—FOURTH AMENDMENT GUARANTEES STUDENTS THE RIGHT TO BE FREE FROM UNREASONABLE SEARCHES AT SCHOOL

I. FACTS

On October 8, 2003, Assistant Principal Kerry Wilson escorted Savana Redding, a thirteen-year-old middle school student, from her classroom to his office to search her for prescription-strength ibuprofen and over-the-counter naproxen.[1] Wilson asked Redding about the items found in a day planner that student Marissa Glines had with her in the classroom.[2] Redding told Wilson that she had given the day planner to Glines several days before but was not aware of any of the items it contained.[3] Wilson then revealed the prohibited ibuprofen and naproxen he received from student Jordan Romero and found on Glines's person.[4] In response to Wilson's questioning, Redding denied

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[1] Safford Unified Sch. Dist. No. 1 v. Redding, 129 S. Ct. 2633, 2638 (2009). Wilson was following up on a tip he had received from Marissa Glines, a friend of Redding's. *Id.* at 2640-41. A week prior, student Jordan Romero notified Wilson that some students had brought drugs and weapons to school and he had gotten sick after taking pills the received from a fellow student. *Id.* at 2640. On the morning of the search at issue, Jordan gave Wilson a pill that he received from Glines and notified him that the students intended to take the pills at lunch. *Id.* The school nurse, Peggy Schwallier, told Wilson the pill was prescription-strength ibuprofen. *Id.*

[2] *Id.* at 2638. Safford Middle School policy "strictly prohibit[ed] the nonmedical use, possession, or sale of any drug on school grounds." *Id.* at 2639-40. The policy included any over-the-counter or prescription drug, unless the use of the drug was permitted by school board policy. *Id.* Because of Jordan's tip, Wilson had searched Glines and a day planner located next to her in the classroom for ibuprofen in his office. *Id.* at 2640.

[3] *Id.* at 2638. Wilson had found several knives, a cigarette, lighters, and a permanent marker in the day planner. *Id.*

[4] *Id.* at 2638. In the presence of administrative assistant Helen Romero (unrelated to Jordan Romero), Wilson had instructed Glines to pull out her pockets and open her

knowing about the pills and handing them out to her fellow students; thus, she allowed Wilson to search her backpack.[5] Administrative assistant Helen Romero and Wilson searched her backpack and found no pills.[6]

After finding no pills in Redding's backpack, Wilson directed Romero and school nurse Peggy Schwallier to search Redding's clothes for pills in the school nurse's office.[7] Romero and Schwallier did not find any pills in the outer layers of Redding's clothes; therefore, they asked her to remove her outer garments down to her bra and underwear.[8] Next, they directed Redding to pull her bra out to the side and shake it and to pull out the elastic band on her underwear.[9] The resulting search partially exposed her breasts and pelvic area, but they found no pills.[10]

In response, Redding's mother filed a 42 U.S.C. § 1983 action in the United States District Court for the District of Arizona against Wilson, Romero, Schwallier, and Safford Unified School District No. 1 ("Petitioners") alleging that the strip search of Redding violated her Fourth Amendment rights.[11] Claiming the defense of qualified immunity, the Petitioners filed a motion for summary judgment.[12] The district court granted the Petitioners' motion but on the ground that no Fourth

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wallet. *Id.* at 2640. He found one over-the-counter naproxen, several prescription-strength ibuprofen, and a razor blade. *Id.* When questioned about the drugs, Glines told Wilson that she received the drugs from Redding. *Id.* Wilson did not ask Glines any additional questions specifically about Redding. *Id.* He then directed Romero and Schwallier to search Glines's bra and underpants, but the search revealed no additional pills. *Id.* At this point, Wilson pulled Redding out of class to follow up on the information he received from Glines. *Id.*

[5] *Id.* at 2638.

[6] *Id.*

[7] *Id.*

[8] *Id.*

[9] *Id.*

[10] *Id.*

[11] *Id.*

[12] *Id.* The Petitioners' motion argued that the strip search of Redding did not violate her Fourth Amendment rights; thus, without a constitutional violation, no further inquiry by the court was required. Redding v. Safford Unified Sch. Dist. No. 1, 531 F.3d 1071, 1077 (9th Cir. 2008) (en banc), *aff'd in part, rev'd in part*, 129 S. Ct. 2633 (2009).

Amendment violation had occurred.[13] On appeal, the Court of Appeals for the Ninth Circuit upheld the grant of summary judgment in favor of the Petitioners.[14] On rehearing en banc, the Ninth Circuit reversed the decision and held that the strip search violated Redding's Fourth Amendment rights.[15] The Ninth Circuit then utilized the test for qualified immunity and held that Redding's rights were "clearly established" at the time of Wilson's search, but not as to the search performed by Schwallier and Romero.[16] Thus, Wilson was denied qualified immunity, but Schwallier and Romero's qualified immunity was affirmed.[17]

The United States Supreme Court granted certiorari and held: affirmed in part, reversed in part, and remanded.[18] When

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[13] *Id.* The district court found for Petitioners solely on the basis that there was no violation of Redding's Fourth Amendment rights as established by *New Jersey v. T.L.O.*, 469 U.S. 325, 342 (1985). *Id.* The district court held that the necessity to find "the ibuprofen was sufficiently urgent that the strip search was 'reasonably related' to the search's objective and was not 'excessively intrusive.'" *Id.* at 1078 (quoting New Jersey v. T.L.O., 469 U.S. 325, 342 (1985)). The district court's conclusion rendered the decision on qualified immunity unnecessary. *Id.*

[14] Redding v. Safford Unified Sch. Dist. No. 1, 504 F.3d 828, 836 (9th Cir. 2007), *rev'd en banc*, 531 F.3d 1071 (9th Cir. 2008), *aff'd in part, rev'd in part*, 129 S. Ct. 2633 (2009).

[15] *Redding*, 531 F.3d at 1089. The Ninth Circuit followed the two-step process for deciding claims of qualified immunity, pursuant to *Saucier v. Katz*, 533 U.S. 194, 200 (2001). *Id.* at 1078. In the first step of the process, the Ninth Circuit concluded that the strip search of Redding was unjustified and unreasonable in scope under the Fourth Amendment test for searches of students by school officials as set out in *New Jersey v. T.L.O.*, 469 U.S. 325 (1985). *Redding*, 531 F.3d at 1081-87.

[16] *Id.* at 1089. In applying the second step of the process for deciding claims of qualified immunity, the Ninth Circuit held that the "notions of personal privacy [were] 'clearly established' in that they inhere[d] in all of us, particularly middle school teenagers, and [were] inherent in the privacy component of the Fourth Amendment's proscription against unreasonable searches." *Id.* at 1088-89 (quoting Brannum v. Overton County Sch. Bd., 516 F.3d 489, 499 (6th Cir. 2008)).

[17] *Id.* at 1089. Romero and Schwallier were merely following Wilson's instructions; therefore, they were granted qualified immunity because they did not act as "independent decision-makers." *Id.*

[18] *Redding*, 129 S. Ct. at 2637. Most significantly, eight members of the Court affirmed that the strip search was a violation of Savana Redding's Fourth Amendment rights, while Justice Thomas dissented. *Id.* The Court reversed the Ninth Circuit's decision to deny Assistant Principal Wilson qualified immunity by a vote of 7-2 with Justices Stevens and Ginsburg dissenting, while all Justices affirmed the decision to grant Romero and Schwallier qualified immunity. *Id.* In addition, the Court remanded the issue of liability of petitioner Safford School District, which was not addressed by the Ninth Circuit. *Id.* at 2644. Justice Souter delivered the opinion of the Court and

a school official conducts a strip search of a student based upon a suspicion that the student has violated the school policy prohibiting the possession of prescription drugs and the official does not reasonably suspect danger or that the student has resorted to her underwear to hide the drugs, the search is unreasonable and excessively intrusive in violation of the student's Fourth Amendment rights.[19]

II. RELATED LAW

A. Fourth Amendment Jurisprudence

The Fourth Amendment of the United States Constitution provides the following in pertinent part:

> [T]he right of the people to be secure in their persons . . . against unreasonable searches and seizures . . . shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.[20]

Generally, probable cause exists in the law enforcement setting when "facts and circumstances" known to a police officer and based on "reasonably trustworthy information" would warrant a person of "reasonable caution in the belief that an offense has been or is being committed."[21] Further, the officer should reasonably believe that the search will yield evidence related to the suspected offense.[22]

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was joined by Justices Scalia, Kennedy, Breyer, Alito, and Chief Justice Roberts; Justices Stevens and Ginsburg joined as to Parts I-III. *Id.* at 2637. Justice Stevens wrote an opinion concurring in part and dissenting in part, in which Justice Ginsburg joined. *Id.* Also, Justice Ginsburg wrote an opinion concurring in part and dissenting in part. *Id.* Finally, Justice Thomas wrote an opinion concurring in part and dissenting in part. *Id.*

[19] *Redding*, 129 S. Ct. at 2641-44.

[20] U.S. CONST. amend. IV.

[21] Brinegar v. United States, 338 U.S. 160, 175-76 (1949) ("In dealing with probable cause, . . . we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act." (quoting Carroll v. United States, 267 U.S. 132, 162 (1925))).

[22] *Id.*

The Court has used different factors to decide what constitutes reliable knowledge to justify a finding of probable cause.[23] However, because such factors do not strictly control,[24] the Court views probable cause principles as "fluid concepts that take their substantive content from the particular contexts in which the standards are being assessed."[25] Particularly, in *New Jersey v. T.L.O.*, the Court held that a standard less than probable cause was necessary in searches of students conducted by school administrators; in effect, the case narrowed students' Fourth Amendment rights when they were on school grounds.[26]

B. New Jersey v. T.L.O.

In *New Jersey v. T.L.O.*, the Court considered the scope of a student's Fourth Amendment rights in a school setting for the first time.[27] Public school student T.L.O. and a classmate were caught smoking in the bathroom in violation of school policy.[28] The teacher who caught the students escorted them to the principal's office.[29] T.L.O. denied the allegation, while the other student admitted to smoking in the bathroom.[30] The assistant principal searched her purse and found cigarettes and rolling

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[23] *See, e.g.*, Adams v. Williams, 407 U.S. 143, 148-49 (1972) (holding that knowledge is reliable when the degree of known facts implies unlawful actions and is then further corroborated by the existence of facts provided by an informant, thus constituting probable cause); Spinelli v. United States, 393 U.S. 410, 416-19 (1969) (considering the particularity of the information received to hold that the information was not reliable to constitute probable cause); Aguilar v. Texas, 378 U.S. 108, 114-16 (1964) (deciding that an unidentified informant's information was not credible or reliable enough to meet the requirements for probable cause).

[24] Illinois v. Gates, 462 U.S. 213, 230-31 (1983) (holding that while "an informant's 'veracity,' 'reliability,' and 'basis of knowledge' were all relevant in determining the value of the informant's report, the elements should not be "rigidly" applied in every case).

[25] Ornelas v. United States, 517 U.S. 690, 696 (1996) (citing *Gates*, 462 U.S. at 232). *See also Brinegar*, 338 U.S. at 175 ("The standard of proof [for probable cause] is . . . correlative to what must be proved.") Therefore, the best distinction might be that prior to conducting an evidence search, a law enforcement officer must have knowledge that raises a "fair probability" or a "substantial chance" of finding evidence of unlawful conduct. *Gates*, 462 U.S. at 238.

[26] New Jersey v. T.L.O., 469 U.S. 325 (1985).

[27] *Id.*

[28] *Id.* at 328.

[29] *Id.*

[30] *Id.*

papers commonly associated with marijuana use.[31] Concerned about illegal drug possession, the assistant principal proceeded with a more intrusive search deeper into the purse and found marijuana, a pipe, plastic bags, a large amount of money, and documents implicating the student in marijuana dealing.[32] The school administration turned over the evidence found in the search to the police, who then brought delinquency charges against T.L.O. in juvenile court.[33]

At trial, T.L.O. claimed the assistant principal's search violated her Fourth Amendment rights and moved to suppress the evidence found in her purse.[34] The juvenile court, finding no Fourth Amendment violation, denied her motion to suppress, and the appellate division affirmed the ruling.[35] However, instead of applying the probable cause standard to the Fourth Amendment challenge of the search, the New Jersey Supreme Court found the search unconstitutional under a more relaxed, "reasonable suspicion" standard which the court held should apply to searches of students by school administrators.[36] The United States Supreme Court granted certiorari and accepted the "reasonable suspicion" standard; however, in applying the standard, the Court reversed the lower court's decision and held that the search of T.L.O.'s purse was constitutional.[37]

In *T.L.O.*, the Court reached two relevant conclusions. First, the doctrine of *in loco parentis* was not appropriate in the school setting because school officials were government agents subject to the Fourth Amendment when searching students at

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[31] *Id.*

[32] *Id.*

[33] *Id.* at 328-29.

[34] *Id.* at 329.

[35] *Id.* at 329-30.

[36] *Id.* at 330-31. The New Jersey Supreme Court concluded that searches of students by school officials did not violate the Fourth Amendment if "the official 'ha[d] reasonable grounds to believe that a student possesse[d] evidence of illegal activity or activity that would interfere with school discipline and order.'" *Id.* (quoting State *ex rel.* T.L.O., 94 N.J. 331, 346 (1983)).

[37] *T.L.O.*, 469 U.S. at 331-33. The Court first granted certiorari on the issue of whether the exclusionary rule applied in a juvenile court proceeding; however, the Court later requested that the parties argue the issue of the Fourth Amendment's role in the school setting. *Id.* at 332. Upon issuing its holding, the Court expressly stated that it was not deciding on the exclusionary rule issue. *Id.* at 333 n.3.

school.[38] Second, that courts should use a balancing test to determine which Fourth Amendment elements govern searches of students and their personal belongings while in school.[39]

The Court's decision to apply the general reasonableness interpretation of the Fourth Amendment to school searches was balanced against student privacy interests.[40] In delivering the opinion of the Court, Justice White emphasized the school's need to maintain order and discipline on school grounds and to preserve a healthy learning environment.[41] The Court was particularly concerned with threats to order and the learning process arising from the presence of contraband at schools.[42] Therefore, the Court exempted school searches from the traditional Fourth Amendment principle that required probable cause before conducting a search.[43] The Court balanced the school's needs against a student's reasonable expectation of privacy.[44] In relation to a student's reasonable expectation of pri-

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[38] *Id.* at 334-37. *In loco parentis* means "in the place of a parent," and prior to *T.L.O.*, some courts applied this doctrine and suggested that school officials acted "in the place of a parent" during school hours and were not inhibited by the Fourth Amendment when conducting searches of students. Morse v. Frederick, 551 U.S. 393, 413-14 (2007) (Thomas, J., concurring). Under this doctrine, "the judiciary was reluctant to interfere in the routine business of school administration, allowing schools and teachers to set and enforce rules and to maintain order." *Id.* at 414 (citation omitted). The Court found the doctrine of *in loco parentis* to be "in tension with contemporary reality and the teachings of this Court." *T.L.O.*, 469 U.S. at 336. "In carrying out searches and other disciplinary functions . . . school officials act as representatives of the State, not merely as surrogates for the parents, and they cannot claim the parents' immunity from the strictures of the Fourth Amendment." *Id.* at 336-37. The Court argued that "public school officials do not merely exercise authority voluntarily conferred on them by individual parents; rather, they act in furtherance of publicly mandated educational and disciplinary policies." *Id.* at 336.

[39] *T.L.O.*, 469 U.S. at 337.

[40] *Id.* at 337. In his concurring opinion, Justice Blackmun accepted the use of the balancing test in searches at school, but he emphasized that when analyzing the Fourth Amendment, balancing was the exception to the rule. *Id.* at 352-53 (Blackmun, J., concurring).

[41] *Id.* at 339-40 (majority opinion).

[42] *Id.* at 353 (Blackmun, J., concurring) ("The special need for an immediate response to behavior that threatens either the safety of schoolchildren and teachers or the educational process itself justifies the Court in excepting school searches from the warrant and probable-cause requirement . . . .").

[43] *Id.* at 341-42 (majority opinion).

[44] *Id.* at 338-40. *See also id.* at 339 ("In short, schoolchildren may find it necessary to carry with them a variety of legitimate, noncontraband items, and there is no reason

vacy at school the Court found that "[a] search of a child's person or of a closed purse or other bag carried on her person, no less than a similar search carried out on an adult, [was] undoubtedly a severe violation of subjective expectations of privacy."[45]

The Court introduced a two-prong test to determine the reasonableness of a school search.[46] First, a court must determine whether the search "was justified at its inception," and, second, whether the actual search "was reasonably related in scope to the circumstances which justified the interference in the first place."[47] Ordinarily, a school official's search of a student was "justified at its inception" when reasonable grounds existed to suspect that a search would reveal evidence that the student had or intended to violate either the law or school policy.[48] The scope of a school search was permissible "when the measures adopted [were] reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction."[49] Applying this reasonableness test to the facts of the case, the Court con-

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to conclude that they have necessarily waived all rights to privacy in such items merely by bringing them onto school grounds.").

[45] *Id.* at 337-38 (footnote omitted). The Court balanced student privacy interests with the school needs and came to a unanimous conclusion that school officials were excluded from the warrant requirement under the Fourth Amendment. *Id.* at 340. Justice White contended that obtaining a warrant "would unduly interfere with the maintenance of the swift and informal disciplinary procedures needed in the schools," thus, frustrating "the governmental purpose behind the search." *Id.* (citation omitted). The Court then decided that probable cause to perform a warrantless search at school was not necessary under normal circumstances by emphasizing that "the legality of a search of a student should depend simply on the reasonableness, under all circumstances, of the search." *Id.* at 340-41. Thus, "a careful balancing of governmental and private interests suggest[ed] that the public interest [was] best served by a Fourth Amendment standard of reasonableness that stop[ped] short of probable cause . . . ." *Id.* at 341.

[46] *Id.*

[47] *Id.* (quoting Terry v. Ohio, 392 U.S. 1, 20 (1968)).

[48] *Id.* at 341-42. *See also id.* at 346 ("But the requirement of reasonable suspicion is not a requirement of absolute certainty: 'sufficient probability, not certainty, is the touchstone of reasonableness under the Fourth Amendment . . . .'" (quoting Hill v. California, 401 U.S. 797, 804 (1971))).

[49] *Id.* at 342.

cluded that the search of T.L.O.'s purse was constitutional under the Fourth Amendment.[50]

C. Qualified Immunity and T.L.O.*'s Progeny*

When the Court rules on the issue of qualified immunity, if "clearly established law" fails to show how a search violated the Fourth Amendment, then the government official is entitled to qualified immunity.[51] In *Saucier v. Katz*, the Court established a two-step protocol to follow when determining the validity of a government official's qualified immunity claim.[52] First, a court must ask whether the facts show that the official's conduct violated a constitutional right.[53] Second, if a constitutional right was violated, the court then determines whether the constitutional right was "clearly established."[54]

Recently, the Court's opinion in *Pearson v. Callahan* made the *Saucier* two-step protocol less restrictive.[55] Where *Saucier* required courts to confront the first prong of the analysis before addressing the second, the Court in *Pearson* ruled that "the *Saucier* protocol should not be regarded as mandatory in all cases."[56]

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[50] *Id.* at 343. In applying the reasonableness test to the facts of the case, the Court divided the events into two separate searches. *Id.* at 343-44. The search conducted for cigarettes was reasonable because the determination of whether T.L.O. had cigarettes on her person was relevant to the accusation that she had violated the no-smoking rule. *Id.* at 344-45. The Court utilized the teacher's accusation that T.L.O. had violated the no-smoking rule to sustain the reasonableness of the decision to search her purse. *Id.* at 345-46. The second, more intrusive search of her purse produced rolling papers, which, the Court contended, created a "reasonable suspicion" that T.L.O. had marijuana on her person; thus, the second search was also held to be valid. *Id.* at 347.

[51] Pearson v. Callahan, 129 S. Ct. 808, 822 (2009). For the law to be established clearly, "the very action in question" does not have to be previously held unlawful. Wilson v. Layne, 526 U.S. 603, 615 (1999) (quoting Anderson v. Creighton, 483 U.S. 635, 640 (1987)). Also, "officials can still be on notice that their conduct violates established law even in novel factual circumstances." Hope v. Pelzer, 536 U.S. 730, 741 (2002) (citing United States v. Lanier, 520 U.S. 259 (1997)). *See supra* notes 15-16.

[52] Saucier v. Katz, 533 U.S. 194, 200-01 (2001).

[53] *Id.* at 201.

[54] *Id.*

[55] *Pearson*, 129 S. Ct. at 818.

[56] *Id.* The Court clarified its conclusion by stating that lower courts remained free to follow the *Saucier* procedure; however, those courts would now have the discretion to decide whether that procedure was worthwhile in particular cases. *Id.* at 821.

Although *T.L.O.* required school officials to restrict the scope of a school search according to age and sex of the student and the reason for the search, courts have split on how the standard should apply to strip searches.[57] Therefore, lower courts have also come to different conclusions regarding an official's qualified immunity after applying the *T.L.O.* two-step standard used to determined the reasonableness of school searches.[58]

III. SAFFORD UNIFIED SCHOOL DISTRICT NO. 1 V. REDDING

A. Majority Opinion

In *Redding*, the Court addressed whether a student subjected to a strip search by school officials, who acted on a "reasonable suspicion" that the student had brought prohibited over-the-counter and prescription drugs to school, violated the Fourth Amendment.[59] The Court held that the strip search of Savana Redding violated her Fourth Amendment rights "[b]ecause there were no reasons to suspect the drugs presented a danger or were concealed in her underwear. . . ."[60] However, the Court held that the school official that directed the unconstitutional strip search was entitled to qualified immunity from liability because there was "reason to question the clarity with which the right was established."[61]

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[57] *See, e.g.*, Williams v. Ellington, 936 F.2d 881, 886-87 (6th Cir. 1991) (holding that a strip search of a high school student to find drugs was reasonable under the *T.L.O.* standard, despite the fact there was no suspicion that the drugs were concealed close to her body).

[58] *See also* Thomas v. Roberts, 323 F.3d 950, 953-55 (11th Cir. 2003) (granting qualified immunity to a police officer and teacher who conducted a strip search of a fifth grade class in search of a missing twenty-six dollars); Jenkins v. Talladega City Bd. of Educ., 115 F.3d 821, 828 (11th Cir. 1997) (en banc) (granting qualified immunity to a teacher and school counselor who conducted two strip searches of two eight-year old students in an attempt to find seven dollars stolen from a classmate) ("Faced with a series of abstractions . . . and a declaration of seeming deference to the judgments of school officials . . . it is difficult to discern how *T.L.O.* could be interpreted to compel the conclusion . . . [that] all reasonable educators standing in defendants' place should have known that their conduct violated a clearly established constitutional right.").

[59] Safford Unified Sch. Dist. No. 1 v. Redding, 129 S. Ct. 2633, 2637 (2009).

[60] *Id.*

[61] *Id.* at 2637-38.

The Court began by discussing Fourth Amendment cases that defined the parameters of probable cause and clarified the knowledge element of probable cause.[62] However, the Court adhered to the reasoning established in *T.L.O.* when it concluded that "[t]he lesser standard for school searches could as readily be described as a moderate chance of finding evidence of wrongdoing," as opposed to a "fair probability" or a "substantial chance," in the case of law enforcement officers.[63] Thus, the Court followed the more relaxed Fourth Amendment standard for school searches established in *T.L.O.* to test the reasonableness of the strip search of Redding.[64]

The Court applied the two-part reasonableness test set out in *T.L.O.*[65] First, the Court validated the school's drug policy that Redding was suspected of violating because "[w]hen the object of a school search [was] the enforcement of a school rule, a valid search assume[d] . . . the rule's legitimacy."[66] In addressing the first search of Redding, the Court found that the information Assistant Principal Wilson received from Glines was enough for him to suspect Redding of distributing pills; accordingly, this suspicion justified the search of Redding's backpack and outer clothing.[67] Thus, the Court concluded the first search of Redding was "justified at its inception" and "not excessively intrusive."[68]

The Justices of the Court "part[ed] company" as to the reasonableness of Wilson's instructions to extend the search to the point of requiring Redding to strip to her underwear and pull out her bra and underwear.[69] In regards to the second search, "both subjective and reasonable societal expectations of personal

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[62] *Id.* at 2639. *See supra* notes 20-25 and accompanying text.

[63] *Id.* (internal quotations omitted) (quoting Illinois v. Gates, 462 U.S. 213, 238, 244 n.13 (1983)). *See supra* notes 24-26 and accompanying text.

[64] *Id. See supra* notes 45-49 and accompanying text.

[65] *Id.* at 2639-43.

[66] *Id.* at 2640 n.1.

[67] *Id.* at 2641 ("If a student is reasonably suspected of giving out contraband pills, she is reasonably suspected of carrying them on her person . . . . If Wilson's reasonable suspicion of pill distribution were not understood to support searches of outer clothes and backpack, it would not justify any search worth making.").

[68] *Id.*

[69] *Id.*

privacy" required distinct elements of justification beyond the reasons for the original search.[70] Emphasizing the minimal danger posed by the drugs in question, the Court found that Wilson's suspicions did not "match the degree of intrusion" because he had no reason to believe that students had been exposed to a large amount of drugs or pills.[71] In other words, such an extensive search would require the "suspicion that it [*would*] *pay off*."[72] The Court noted that the Fourth Amendment still restricted school officials regardless of the high level of deference afforded to the official's professional judgment.[73] With regard to Redding's Fourth Amendment rights, the Court made it apparent that a school official must reasonably suspect some danger or that the student has hidden evidence of wrongdoing in her undergarments before a search can reasonably make the "quantum leap" from outer garments and personal belongings to exposure of the student's intimate parts.[74] Thus, the Court placed such an intrusive search into a separate category that demanded "its own specific suspicions."[75]

However, the Court reversed the Ninth Circuit's decision to deny Assistant Principal Wilson qualified immunity and affirmed the decision to grant Romero and Schwallier qualified immunity.[76] Despite *T.L.O.*'s reasonableness requirement, no "clearly established law" showed that the strip search violated the Fourth Amendment.[77] The Court determined that many well-reasoned lower court cases following the *T.L.O.* standard had arrived at different results which suggested that the state of the law was not clear; thus, the Court granted the school officials qualified immunity.[78] In addition, the Court remanded the

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[70] *Id.* ("Savana's subjective expectation of privacy against such a search is inherent in her account of it as embarrassing, frightening, and humiliating."). The Court also emphasized that her age, along with the common detrimental emotional effects of such searches, intensified the intrusiveness of the search. *Id.* at 2641-42.

[71] *Id.* at 2642. The Court added that Wilson could not have suspected that Redding was concealing the drugs in her underwear. *Id.*

[72] *Id.* (emphasis added).

[73] *Id.* at 2643.

[74] *Id.*

[75] *Id.*

[76] *Id.* at 2644.

[77] *Id.* at 2643-44. *See supra* notes 51-56 and accompanying text.

[78] *Id.* at 2644. *See supra* notes 57-58 and accompanying text.

issue of the liability of Safford School District, which was not addressed by the Ninth Circuit.[79]

B. *Justice Stevens's Opinion, Concurring in Part and Dissenting in Part*

Justice Stevens, joined by Justice Ginsburg, disagreed with the majority's decision to grant the assistant principal qualified immunity, while joining the majority on the decision to declare the strip search unconstitutional.[80] Justice Stevens reasoned that the unconstitutionality of the search was obvious; thus, in this case, the school officials responded to "clearly established law [with] clearly outrageous conduct."[81] He contended that disagreement among the lower courts regarding the application of *T.L.O.* to strip searches did not signify lack of clarity in the law.[82] He also argued that the Court charted "no new constitutional path;" rather, the Court merely applied the standard set out in *T.L.O.* to the facts of the present case to come to a conclusion.[83]

C. *Justice Ginsburg's Opinion, Concurring in Part and Dissenting in Part*

Justice Ginsburg joined Justice Stevens in dissenting from the Court's decision to grant Assistant Principal Wilson qualified immunity, but she agreed with the majority that the strip search of Redding violated the Fourth Amendment.[84] Justice Ginsburg determined that qualified immunity was inappropriate in this case because of the standards "plainly stated" in *T.L.O.*, concluding that "Wilson's treatment of Redding was ab-

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[79] *Id.*

[80] *Id.* (Stevens, J., concurring in part and dissenting in part).

[81] *Id.* To further emphasize his point, Justice Stevens stated, "[i]t does not require a constitutional scholar to conclude that a nude search of a 13-year-old child is an invasion of constitutional rights of some magnitude." *Id.* (quoting New Jersey v. T.L.O., 469 U.S. 325, 382 n.25 (1985)).

[82] *Id.* at 2644-45 (emphasis added). *See also id.* at 2645 ("[T]he clarity of a well-established right should not depend on whether jurists have misread our precedents.").

[83] *Id.* ("Our conclusion leaves the boundaries of the law undisturbed.").

[84] *Id.* at 2645-46 (Ginsburg, J., concurring in part and dissenting in part).

usive and it was not reasonable for him to believe that the law permitted it."[85]

D. *Justice Thomas's Opinion, Concurring in Part and Dissenting in Part*

Justice Thomas agreed with the Court's judgment to allow the school officials qualified immunity; however, he was the lone dissenter on the issue of Redding's Fourth Amendment rights.[86] He argued that the Court should not interfere with the school's attempts to maintain a safe and healthy environment for students; thus, he urged the Court to return to the common law doctrine of *in loco parentis*[87] and emphasized that "the task of implementing and amending public school policies [was] beyond the Court's function."[88] Justice Thomas also argued that as long as it was "objectively reasonable to believe that the area searched could conceal the contraband," then the search was within the scope justified by *T.L.O.*[89] Justice Thomas further argued that the Court's decision told students "the safest place" to hide drugs, while limiting the ability of school officials to respond.[90] Justice Thomas emphasized that the result of the Court's opinion was a test that was "unworkable and unsound" because the strip search of a student "for prohibited drugs [would] be permitted only if the Court agrees that the drug in question was sufficiently dangerous."[91] In conclusion, Justice Thomas believed the search was "reasonable and justified" under the *T.L.O.* standard; thus, he refused to join the majority's "regrettable decision."[92]

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[85] *Id.* at 2646 (arguing that Wilson's order to strip search Redding "cannot be reconciled with this Court's opinion in *T.L.O.*").

[86] *Id.* at 2646 (Thomas, J., concurring in part and dissenting in part).

[87] *Id.* at 2655.

[88] *Id.* at 2657. *See supra* note 38 and accompanying text.

[89] *Id.* at 2649-50.

[90] *Id.* at 2650.

[91] *Id.* at 2651. Justice Thomas concluded that judges should not mistakenly assume the responsibility of deciding which school rules warranted an invasive search and which rules did not. *Id.* at 2652.

[92] *Id.* at 2658.

IV. DISCUSSION

The Supreme Court, in deciding *Redding*, simply applied the reasonableness standard set forth in *T.L.O.* to the facts of the case to find that Redding's Fourth Amendment rights were violated as a result of the strip search conducted by school officials.[93] The Court's decision recognized not only that Redding's account of her search was "embarrassing, frightening and humiliating" but that "adolescent vulnerability intensifie[d] the exposure's patent intrusiveness."[94] Recognizing the intrusive nature of a search of a thirteen-year-old's bra and underwear and the heightened standard of "reasonable suspicion" necessary for such a search, the Court concluded that the school officials had no reason to suspect the drugs presented a danger or were concealed in Redding's underwear. Thus, the Court clearly established that strip searches are in separate category that demands particular suspicions.[95]

Thus, the Court elaborated on and clarified the scope of a student's Fourth Amendment rights in regard to school searches.[96] Thereby, *Redding* recognized and expanded the privacy interests of students at school, which were previously unclear and narrow in focus.[97] Although the Court granted the school officials qualified immunity, the *Redding* decision stands as a victory to students nationwide because it resulted in a "clearly established" ruling. Thus, *Redding* secured the Fourth Amendment right of millions of students to be free from humiliating, unjustified, and unreasonable strip searches.[98]

However, given the narrow focus of the opinion to the specific facts of the case, the subsequent application of *Redding* by lower courts may prove difficult and result in inconsistent holdings as courts are presented with varied and more complex fact patterns that are not as obviously intrusive as the facts in *Redding*. Until lower courts apply *Redding* to invalidate school

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[93] *Id.* at 2639-43 (majority opinion). *See supra* notes 63-75 and accompanying text.
[94] *See supra* note 70 and accompanying text.
[95] *See supra* notes 69-75 and accompanying text.
[96] *See supra* notes 26, 38-40 and accompanying text.
[97] *See supra* notes 51-58, 74 and accompanying text.
[98] *See supra* notes 78 and accompanying text.

searches in other, more difficult cases, the question of its practical effect remains unanswered.

CONCLUSION

In *Safford Unified School District No. 1 v. Redding*, the Supreme Court held that a student's Fourth Amendment right to be free from unreasonable searches was violated when the student, who was under suspicion of possessing prohibited drugs, was subjected to a strip search by school officials when there was no reason to suspect the drugs presented a danger or were concealed in the student's underwear. Through its decision, the Court granted students more extensive privacy interests by clarifying and enlarging the scope of a student's Fourth Amendment rights in the school setting. The extent of a student's Fourth Amendment rights was previously unclear, as evidenced by the differing treatments by lower courts of the *T.L.O.* standard. While this decision was a narrow application of a student's Fourth Amendment rights to case-specific facts, *Redding* clearly established a precedent that could result in liability for school officials who disregard their students' Fourth Amendment rights and privacy interests.

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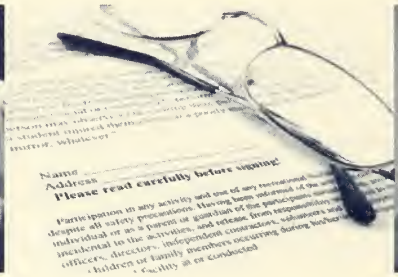

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